UNITED STATES USE OF FORCE AGAINST TERRORISM AND THE THREAT OF TERRORISM: AN ANALYSIS OF THE PAST FOUR U.S. PRESIDENTS' USE OF FORCE TO COMBAT INTERNATIONAL TERRORISM

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The thesis analyzes how the administrations of Ronald Reagan, George H.W. Bush, Bill Clinton, and George W. Bush used force in response to incidents of international terrorism. Key players in each administration and whether they advocated a law enforcement approach or a war paradigm approach to counterterrorism are examined. In addition, Koh's pattern of executive initiative, congressional acquiescence, and judicial tolerance forms a theoretical lens through which to compare and contrast administrations. An assessment of the role of Congress in making the administrations' counterterrorism policies confirms the vitality of this pattern, and suggests future administrations will adhere to it. During the George W. Bush administration, Koh's pattern of executive initiative (led by personalities like Vice President Cheney), congressional acquiescence, and judicial tolerance combined with the 9/11 tragedy and pervasive fears of another attack to create a "perfect storm" known as the "war on terror". The research also analyzes to what extent the four administrations were constrained by international legal norms on the use of force, i.e. articles 2(4) and 51 of the UN Charter. On the domestic side, the thesis analyzes the extent to which American legal norms on the use of force constrained the administrations. Although the lack of compelling constraints on the use of force is present in all four administrations, the thesis indicates that the George W. Bush administration embodied an extreme example of this trend.

With Sincere Gratitude for the assistance I received from Professor Paul Rogers, my husband Bart, and my daughters Elayne and Olivia. I could not have finished without their exceptional support.

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Chapter One
Introduction

One of the most enduring expressions from George W. Bush's administration was the claim (or a variant) that "everything changed on September 11, 2001." As most people on the planet watched on TV that day, 19 hijackers in four hijacked planes shocked the world by flying into the World Trade Center, the Pentagon, and a field in Pennsylvania. The final death toll was almost 3,000 with thousands more injured and the U.S. traumatized (Duffy, 2005:1).

The terrorist attacks were attributed to Osama bin Laden and the al Qaeda network which was blamed for previous attacks on American embassies in Nairobi and Dar es Salaam in 1998 and the *USS Cole* in 2000. A noted American expert on terrorism wrote that "bin Laden himself has re-written the history of both terrorism and probably of the post-Cold War era--which he arguably single-handedly ended on September 11th" (Hoffman, 2001:4).

The terrorist attacks in the United States had a profound effect on how Americans and the American government viewed terrorism and counterterrorism. After the attacks, the Bush Administration began a "war on terror" that emphasized the use of military methods in combating international terrorism. As a result of the attacks, the U.S. removed the Taliban regime in Afghanistan late in 2001 because of its support for Osama bin Laden and the al Qaeda network. The Bush Administration also articulated a doctrine of "pre-emptive self-defense" in its *National Security Strategy* which permitted the

U.S. to strike militarily at any state that threatened its security before the U.S. was the victim of an armed attack.

In March of 2003, the administration of George W. Bush led an invasion of Iraq, which eventually toppled the regime of Saddam Hussein and led to his capture. This invasion was justified as a part of the "war on terror," even though there is currently no evidence that Saddam Hussein was involved in the attacks of September 11th. While the U.S. led military action in Afghanistan was largely accepted by the world community as legitimate, the legality of the invasion of Iraq remains hotly disputed. Also, the quality of the intelligence that was used to advocate invading Iraq remains controversial.

The dramatic events of the second Bush administration (reaction to the 9/11 attacks, "war on terror", invasion of Iraq, establishment of Guantanamo) often appeared to be drastic departures from earlier administrations, particularly the preceding administration of Bill Clinton. This research closely examined how different the second Bush administration was, and explored the constraints on Presidents in their foreign policy decision-making as it pertains to using force against international terrorism. In particular, the roles of the American legislature, the Congress, and the judiciary were analyzed to determine whether balanced institutional decision-making was evident regarding decisions to use force in counterterrorism operations.

As this thesis will argue, there is a special dynamic at work regarding the expansion of executive branch powers and terrorism that was not unique to the Bush II administration. Not only is the executive more likely to grab

power in its counterterrorism operations, the other branches of government are most likely to acquiescence to the power grab. The evidence indicates this is due to the combination of several factors: 1) the special dynamic of terrorism in which a frightened public demands action after an attack while accepting government secrecy; 2) lack of congressional incentives and political will to practice effective oversight of the executive when it uses force against international terrorism; 3) tendency of American courts to defer to the executive branch regarding national security decisions. Furthermore, if an administration pursues a **war** instead of a **law enforcement** approach to the problem of international terrorism, there are more theoretical constraints on executive branch action than real constraints.

A serious examination of the constraints faced by modern American Presidents regarding their foreign policy decisions on the use of force in counterterrorism indicates that there are fewer constraints than one assumes. In this regard, the notion of an "imperial president," where presidential power is not adequately balanced by the other branches of government at the expense of presidential accountability, forms an essential part of the analysis. The approach and underlying assumptions of Schlesinger's concept of the imperial president underlie the use of force by the past four administrations. (Schlesinger, 1973) A pattern of "executive initiative, congressional acquiescence, and judicial tolerance" regarding presidential actions in foreign affairs emerges. (Koh, 1990:5) Finally, the common themes and norms of behaviour among the administrations reviewed suggest what the Obama administration might do if faced with the option of using force after what it considered a major "armed attack" by terrorists. Although the past can never

perfectly predict the future, to the extent there are discernible patterns of behaviour, they may point to the most probable course of action.

An examination of the four administrations indicates that a confluence of factors involving terrorism, the balance of power among the world's strongest states, and domestic political realities, shaped various Presidents' decisions to resort to force against terrorism. In addition, the threat posed by international terrorism changed during the course of the four administrations from state-sponsored to non-state terrorism with resulting repercussions. At the same time, the Cold War ended with the dissolution of the Soviet Union, which eliminated the superpower rivalry and encouraged a more multi-polar world. Despite the promise of a "new world order," the U.S. retained its nuclear arsenal, a large standing army, and the capacity to project its armed forces around the globe. The basic rules allocating the power to deploy force in the American system of government were written at the Constitutional Convention in 1787, under vastly different circumstances. The evidence in this research tends to suggest that these factors encourage an executive more imperial and unfettered than constrained and accountable when using force to prevent international terrorism.

Research Questions

Was the Bush Administration's Use of Force to Combat International Terrorism different from previous American administrations?

Secondary questions:

1. What was the administration's policy on the use of force to prevent international terrorism?
2. Who were the key players in the administrations and were there major differences between the departments regarding the use of force?
3. What was the role of Congress in making the administration's use of force policy?
4. Did international legal norms on the use of force operate as a constraint in the administrations?
5. Did American legal norms on the use of force operate as a constraint in the administrations?
6. Are there common themes in the four administrations?

Aims of the research

This research questions whether the claim that "everything changed on 9/11" applies to the use of force by American administrations to combat international terrorism. Specifically, it explores whether the administration of George W. Bush was significantly different from the previous three administrations regarding decisions to use force. To answer this question adequately, several concepts need to be defined and discussed. For instance, what is meant by the term "terrorism"? How has international terrorism changed during the course of the four administrations from 1980 to 2008? The first chapter addresses these questions and the international legal norms regarding the use of force. Finally, the constitutional allocation of

foreign affairs powers in the U.S. political system and the pattern of executive initiative, congressional acquiescence, and judicial tolerance are the subject matters of chapter 3.

At first blush, claiming that one extremely spectacular terrorist attack by non-state actors “changed everything” appears like an exaggeration. It seems improbable that 19 hijackers with four planes could seriously damage the international legal regime that the U.S, the UK and other countries laboriously built after WWII to restrain the resort to force. Perhaps the more accurate claim is that the Bush administration’s reaction to the terrorist attack of 9/11, i.e. the use of military force against the regimes in Afghanistan and Iraq and the doctrine of pre-emption, changed everything.

The purpose of the research is to compare and contrast how the last four American Presidents have used force during their administrations to combat international terrorism. Other uses of force by the four administrations may be mentioned but the focus of this research is on the use of force against international terrorism. An interdisciplinary approach, using methods and perspectives from both political science and law, is appropriate because the problems posed by international terrorism and how to respond to it are both political and legal. The dilemma of combating international terrorism by non-state agents with the use of military force by the world’s greatest military power poses both legal and political questions, so focusing on either the legal or the political elements would be too narrow.

Although a great deal could be written about the Bush administration's human rights approach and international legal norms regarding Abu Ghraib prison in Iraq and Guantanamo Bay in Cuba, this is beyond the scope of this research. In addition, practices like "extraordinary rendition" whereby a non-American suspect is taken to an undisclosed location outside of the U.S. for interrogation are examined briefly as part of the "war on terror". All of these issues are part of the "everything changed on 9/11" mindset that prevailed during the Bush II administration. The question of whether the second Bush administration intended to transform the parameters of customary international legal norms with these practices cannot be addressed in this research due to the limitations on length.

The first chapter is both an introduction to the topic and an explanation of the methodology used in this study. The remaining chapters are presented as follows:

Chapter 2: Literature Review

Chapter 3: Principles allocating foreign affairs powers

Chapter 4: Administration of Ronald Reagan (1981-1988)

Chapter 5: Administration of George H.W. Bush (1989-1992)

Chapter 6: Administration of Bill Clinton (1993-2000)

Chapter 7: Administration of George W. Bush (2001-2009)

Chapter 8: The Legacy of the Bush II Administration

Chapter 9: Conclusions

The following section explains the methodology used in this thesis and discusses some of the primary and secondary sources which are used.

Methodology

My interest in writing a thesis on terrorism and the use of force under international law came about as a result of living near Washington, DC on 9/11 and experiencing the changes in tone, if not substance, that occurred in the Bush administration's post-9/11 foreign and domestic policies. I noted that "everything changed on 9/11" was used as an excuse for pursuing all types of questionable policies and accusing someone of a "pre-September 11th" mindset was as effective as calling them a communist in the 1950's for closing down political debate. The climate of fear that pervaded Washington, DC on September 11, 2001 continued in the autumn of 2001 and extended into 2002 and 2003 as the public grappled with al Qaeda, the anthrax attacks, sniper assaults, and various terrorism scares that unnerved people and may have unwittingly facilitated the Bush II administration's plans for a "war on terror." The Bush administration's links between al Qaeda and Saddam Hussein prior to the Iraq war in 2003 were troubling and the uncertain nature of compelling constraints on the administration was unsettling. Due to my background in

international law, it seemed natural to evaluate the status of the norms governing the use of force and what constrained American presidents regarding the use of force.

Qualitative methods were used throughout the research because they were most appropriate for the type of questions the research attempted to answer. For each of the four administrations, case studies involving the use of force against international terrorism examined the administration's interpretation of war powers. The bulk of the data collection was accomplished by finding and analyzing relevant primary and secondary sources regarding the histories of the past four administrations and international law and international relations. In addition, at the end stages of the data collection, I interviewed members of the four previous administrations, and academics who work in the fields of law and terrorism to cover lacunae in the research.

The following list sets forth the data collection scheme. The primary and secondary sources analyzed how the previous administrations used force in their attempts to prevent international terrorism.

Primary Sources

- United Nations Charter, particularly articles 2(4) and 51 regarding the use of force
- United Nations Security Council Resolutions on Iraq and terrorism
- Policy statements from the Reagan Administration

- Policy statements from the Bush I Administration
- Policy statements from the Clinton Administration
- Policy statements from the Bush II Administration
- War Powers Resolution of 1973
- War Powers letters transmitted to Congress from each President
- U.S. State Department documents from all 4 administrations explaining the official views on the use of force
- Congressional hearings and reports regarding the allocation of foreign affairs powers and international terrorism
- Authorization for the Use of Military Force Against Terrorists (2001)
- Authorization for the Use of Military Force Against Iraq (2002)

Secondary Sources

- Scholarly texts on the use of force
- Academic literature on terrorism and international relations
- Newspaper accounts detailing terrorist attacks and responses to them
- Constitutional law and political science texts on the allocation of foreign affairs power among the three branches of the U.S. government

Interviews

- Members of the Reagan, Bush I, and Clinton administrations who have been involved in the formation of their use of force policies

- Members of the Bush II administration who have been involved in the formation or execution of the "war on terror"
- Academics with expertise in international law, terrorism, or the allocation of power among the three branches of government

At the end of my data collection, I conducted interviews with seven people with either first-hand experience in conducting the "war on terror," or special expertise in terrorism, international law, or international relations. The possibility of interviewees having an "axe to grind" is an important consideration, so educated scepticism was essential when analyzing this type of information. One problem I encountered during this phase of the research was the unwillingness of former members of the Bush II administration to discuss the administration's "war on terror" with me. Despite my reassurances that the questions were for research purposes only, it was difficult to get any one to discuss the administration's policies. However, I was able to interview Colin Powell's former Chief of Staff, Lawrence Wilkerson; Paul Pillar, formerly at the CIA; and another CIA analyst working in the Counterterrorism Center during 9/11. The rest of the interviewees are listed in Appendix Five, along with their background information.

U. S. Constitutional Law Sources

- *Curtiss-Wright Export Corp. v. United States*
- *Youngstown Sheet & Tube Co. v. Sawyer*
- *Hamdan v. Rumsfeld*

These U.S. court cases were discussed briefly, primarily in chapter 3, for their impact on the current allocation of foreign affairs powers between the legislative and executive branches. The discussion examined the domestic legal constraints on presidents, reflecting the multi-disciplinary focus of the research.

In addition to these sources, my research was also fostered by ideas and knowledge generated by lectures and conferences I attended in Washington, DC and the UK from 2002 onwards. Some of the more productive encounters include the following: a discussion by Philippe Sands on his book *Lawless World*; panel discussions on the use of force at the annual conferences of the American Society of International Law; and various conferences on terrorism organized by the New America Foundation. I also attended thought-provoking conferences at the Woodrow Wilson Center for International Scholars and the Brookings Institution examining various topics such as executive power and the nature of the threat posed by al Qaeda. These stimulated further research and facilitated data collection in new directions.

The table below summarizes the most significant terrorist events, dates, and responses during the four administrations in the thesis.

Terrorist Act	Date	Response
Reagan Administration		
Truck bomb explosion outside US Embassy, Beirut	April 18, 1983	None
Marine Barracks Bombing	October 23, 1983	US military formulated plans for retaliatory air strikes which were not carried out. Marines withdrawn from Lebanon by February 26, 1984.
Hijacking of TWA Flight 847	June 14, 1985	Negotiations with hijackers result in eventual release of hostages.
Hijacking of *Achille Lauro*	October 7, 1985	After Egypt allows hijackers to board a civilian airliner, US Navy jets force the plane to land in Sicily. Delta troops surround the plane and there is a four hour standoff between US and Italian forces. Italians tried and convicted 3 of the 4 hijackers; fourth one is caught by US in 2003.
Attacks at Rome and Vienna airports	December 27, 1985	George Shultz argued for military strikes against Libya; Caspar Weinberger opposed the idea. Reagan imposed new economic sanctions against Libya in January 1986.
Explosion aboard TWA Flight 840	April 2, 1986	Part of response to La Belle disco bombing; see below
Bombing of La Belle Disco, Berlin	April 5, 1986	Reagan ordered US Air Force and Navy planes to bomb targets in Libya.
Bombing of Pan Am 108 over Lockerbie	December 21, 1988	Reagan does not respond. US and UK investigate jointly and issue indictments against 2 Libyans. These 2 Libyans are eventually tried in 2000 and one is convicted; he served eight and a half years of his life sentence before being granted release on compassionate grounds.
George H.W. Bush Administration		

Bombing of UTA Flight 772	September 19, 1989	No response by first Bush administration, but 6 Libyans were tried in absentia in Paris in 1999 and convicted.
Clinton Administration		
First World Trade Center Bombing	February 26, 1993	Capture, trial, and imprisonment of conspirators. They are currently serving life sentences in US federal prisons
Federal building in Oklahoma City bombed	April 19, 1995	Timothy McVeigh tried and executed; Terry Nichols imprisoned for life. (Domestic terrorism)
Khobar Towers bombing	June 25, 1996	FBI investigation along with the Saudi investigation. Note: FBI Director Louis Freeh was not satisfied with Clinton's pursuit of the investigation.
Atlanta Olympic Park bombing	July 27, 1996	Eric Rudolph caught in 2003, tried, and imprisoned for life. (Domestic terrorism)
Attempted Assassination of George HW Bush in Kuwait	April 1993	On June 26, 1993 Clinton launched 23 cruise missiles against targets in Iraq; FBI determined that Iraqi Intelligence service was behind the plot. Kuwaiti court later tried and convicted 16 suspects in the plot.
Bombing of US embassies in Kenya and Tanzania	August 7, 1998	On August 20, 1998 Clinton launched 79 cruise missiles against targets in Afghanistan and Sudan.
Bombing of *USS Cole*	October 7, 2000	None
George W. Bush Administration		
Four hijacked planes flown into the World Trade Center towers, Pentagon, and field in Pennsylvania	September 11, 2001	War on Terror involving ground forces in Afghanistan in 2001, and in Iraq in 2003. Also, discreet military operations including the use of armed drones in Afghanistan, Pakistan, Yemen, and Syria. Bush II administration established a "New Paradigm" for the war on terror involving extraordinary rendition, secret prisons, and "enhanced interrogation" techniques.

Terrorism Defined

One particular challenge of this study is the subject matter of terrorism; there is no one generally agreed upon definition of terrorism and, in fact, the UN Special Rapporteur on Terrorism and Human Rights noted that 109 definitions were put forward between 1936 and 1981. Many commentators and states have struggled for a common definition when negotiating international treaties, but it remains elusive, mainly due to the oft-stated proposition that "one man's terrorist is another man's freedom fighter." In addition, there are many variants of terrorism including terrorism by the state, state-sponsored terrorism, religious terrorism, revolutionary terrorism, and transnational terrorism, to name but a few categories (Townsend, 2002). The notion of "catastrophic" terrorism involving weapons of mass destruction (WMD) and high levels of casualties became common in academic literature written after 9/11.

My research will not explore the many types of terrorism or attempt any social, political, or economic explanation for its occurrence, as those questions are beyond the scope of the current study. To the extent that WMD's are discussed, it is in the context of the Bush administration's rationale for invading Iraq in 2003. The focus will be on international, not domestic, terrorism and the definition used in this work is "premeditated, politically-motivated violence perpetrated against non-combatant targets by sub national groups or clandestine state agents, normally intended to influence an audience" (Reich, 1998:262). The most relevant elements of that definition to

this research are twofold: the use of violence for *political* ends, with the agents using the violence being *non-state* entities.

Methods of Preventing International Terrorism

Scholars and national security experts have written a great deal about the merits of different methods of preventing terrorism and responding to specific acts of terrorism. According to one analyst, the U.S. has employed different tools since WWII to combat international terrorism including international legal conventions outlawing specific acts, defensive measures, addressing the causes of terrorism, articulating a policy of no concessions, economic sanctions, prosecution of perpetrators, preemption, disruption, and the use of military retaliation (Tucker, 1997: 72). This paper will focus on the use of force because, in addition to being controversial, it illustrates one area of foreign policy making where the President encounters few real constraints imposed by the other branches of government.

Broadly speaking, there are two schools of thought regarding modern approaches to combating international terrorism by liberal democracies. One approach is to categorize international terrorism as not "merely" criminal activity, but as a national security threat. According to this view, if international terrorism is truly a national security threat, then the use of military force to protect the nation is warranted. Long before the second Bush administration used military force in response to the 9/11 attacks, George Shultz (Secretary of State from 1982 to 1989 under Reagan) advocated

proactive measures against state sponsors of terrorism and terrorists involving the preemptive use of military force.

On the other hand, academics like Paul Wilkinson represent the other school of thought. He warned that liberal democracies should avoid a "total militarization of Western response" to terrorism because it would "encourage the very anarchy in which terrorism flourishes." (Wilkinson, 1986: 299) Wilkinson was careful to differentiate the skilful and targeted "utilisation of the military within a carefully controlled overall judicial" response to terrorism (which he approved of) with the "world war against terrorism" approach favoured by some members of the Reagan administration and prominent think tanks. The use of judicial methods means pursuing international terrorists with enhanced police work and security cooperation leading to the arrest and trial of the perpetrators or their extradition. Often this approach is derided by its detractors as a law enforcement paradigm which fails to adequately address the national security issues faced by the victim country. How influential members of an administration viewed international terrorism (is it criminal activity or war?) naturally affected the administration's counterterrorism policies and responses to acts of terrorism.

Another challenge posed by the subject matter of this research is the fact that terrorism as a tactic is not static. Indeed, international terrorism changed significantly from Ronald Reagan's administration in the 1980's when the focus was on state-sponsored terrorism to the Islamic fundamentalist terrorism that dominated the Bush II administration. Chapters 4, 5, 6, and 7

trace the changing nature of the terrorist threat faced by the four administrations.

International Legal Norms and the Use of Force

The phrase “use of force” in this work refers to either the employment of military force by a state against another state or a group of non-state armed bands or insurgents who are engaged in international terrorism. The use of force may involve a threat to use force, naval blockade or reprisal; it includes, but is not limited to, resorting to war. The term “use of force” is thus broader than the technical term “war” because war is “a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases.” (Dinstein, 2001:4) As discussed below, the UN Charter goes beyond forbidding the recourse to war; it also prohibits member states from using force and threatening to use force.

One of the larger issues surrounding the use of force against terrorist organizations is the problem that the UN Charter was intended to apply to nation states and not to non-state agents, such as al Qaeda, because the greatest threat to world peace in 1945 (when the Charter was written) was the potential of aggression from hostile states. The menace of state-sponsored terrorism and the potential of catastrophic terrorism with large numbers of casualties were not upper most in the minds of those who drafted the UN Charter.

As World War II ended in 1945, much of Europe and parts of the Far East were in ruins; the scale of the destruction and human suffering led governments around the world to a consensus that the international community required better methods of restraining the use of force and promoting peaceful relations among States. The United Nations was founded at the end of the war and one of its main purposes is the maintenance of "international peace and security" (Preamble, UN Charter). The Security Council, whose permanent members included the victors of the war and China, was designed to have "primary responsibility" for this. (Art. 24, UN Charter) Under Chapter VII of the UN Charter, the UN was supposed to have its own standing army to respond to threats to the peace but this never materialized. (Gray, 2004:195) The concept was "collective security," the institution of communal commitments whereby states undertake to join in common actions against those which threaten the territorial integrity or political independence of other states. (Evans and Newnham, 1998:77)

The formal scheme of collective security under Chapter VII was not put into action because after the Second World War ended, the U.S. and the USSR disagreed profoundly on political, economic, and military matters and the "Cold War" which ensued prevented cooperation at the UN. The permanent members of the Security Council were able to use their veto (or simply threaten to use it) to prevent the effective functioning of the UN collective security system. Although no major conflict as large as the Second World War occurred after the creation of the UN, many smaller conflicts, civil wars, and wars of national liberation erupted and shattered the initial optimism about the UN system. Particularly relevant as far as the effort to combat

terrorism goes, one of the system's shortcomings is its emphasis on inter-state conflicts, leaving the norms regulating non-state actors somewhat ambiguous.

Outside of Chapter VII, the most important articles regulating the use of force are articles 2(4) and 51. From the start of the UN era, there was disagreement on how article 2(4) and the prohibition on the use of force should be interpreted. Some scholars believed that this article "reflected existing customary international law" while others saw the same article as a "radical departure from previous customary law, to be narrowly interpreted." (Gray, 2004:29) The debate centers on the phrase at the end of article 2(4), i.e. "against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the UN." It remains unsettled as to whether that prohibits all uses of force against another state, or merely using force when the goal is the overthrow of another state's government or the acquisition of the territory of another state. (Franck, 2002; Gray, 2004)

States and different scholars applied various interpretations of article 2(4) since the creation of the UN Charter. For example, in 1983, President Reagan ordered the U.S. invasion of Grenada and tried to justify the use of force. In debates in the Security Council, the U.S. suggested that article 2(4) should not be interpreted in isolation; rather it was appropriate to view the article as providing "justification for the use of force in pursuit of other values also inscribed in the Charter, such values as freedom, democracy, peace." (Gray, 2004:31) This interpretation of article 2(4) is not widely shared by other

states, and the U.S. bolstered its argument regarding the invasion of Grenada by relying on “the right to protect its nationals in danger and on an invitation by the Governor-General of Grenada,” suggesting that the U.S. realized its interpretation of 2(4) was controversial. (Gray, 2004:31)

The doctrine of humanitarian intervention illustrates the continuing debate over the correct interpretation of article 2(4). Humanitarian intervention is “the use of armed forces by a State, a group of States or an international organization” to prevent or alleviate widespread suffering or death. (Evans and Newnham, 1998:231) Until the 1990’s the doctrine was not used widely by states to justify their uses of force and “during the Cold War it was writers rather than states that argued in favour of the doctrine.” (Gray, 2004:32)

Two other significant debates about the proper interpretation of article 2(4) follow similar lines of argument. The first, the use of force to ensure democratic government in a particular state (known as “pro-democratic intervention”) and the second, the use of force to further the right of a people to self-determination, produced bitter divisions among states whenever one country attempted to use them as justification for the use of force. For instance, some American writers in the 1980’s postulated that the breakdown of the UN collective security system in the Cold War resulted in a situation where article 2(4) should be read as permitting the use of force “to further world public order and to justify pro-democratic invasions by the USA.” (Gray, 2004:50) These writers were associated with the “Neorealists” and proponents of the Reagan Doctrine and, not surprisingly, their theories about

the limits on article 2(4) were not widely accepted outside of the USA. (Scheffer, 1989:11)

The right of a people to self-determination sparked a great deal of controversy as national liberation movements used force to expel colonial powers; occasionally other states assisted them in their pursuit of independence. The General Assembly made no mention of the use of force in its fist major resolution on the right to decolonization, the *Declaration on the Granting of Independence to Colonial Peoples* in 1960. (Gray, 2004) "Deliberate ambiguity" was the only means to arrive at a consensus regarding UN declarations on the self-determination of peoples. (Gray, 2004) The USA, along with many former colonial powers, opposed any express authority to allow the use of force in the struggle for self-determination. The debate over the use of force to pursue self-determination has lost much of its significance now that the decolonization process is almost complete, but it is relevant regarding the Palestinians' claims for statehood. Some countries, for example, Lebanon and Syria, refuse to condemn Hezbollah as a terrorist organization partially because they believe it is struggling for Palestinian self-determination against Israel.

Any discussion of the use of force under the UN Charter must include the debates surrounding article 51, which provides states with the "inherent" right of individual or collective self-defence. While collective security under Chapter VII could be invoked "whenever the Security Council determines that there exists a threat to the peace, a breach of the peace, or an act of aggression," individual or collective self-defence is allowed only in response to

an armed attack. (Dinstein, 2001:250) State practice since 1945 shows a tendency for countries to invoke self-defence under article 51 rather than attempt a justification for using force under 2(4). Indeed, that was the pattern of the four U.S. administrations in this study. The scope of the right of self-defence and certain doctrines such as anticipatory self-defence have been debated since the Charter was signed. (Dinstein, 2001:159) The Bush doctrine of pre-emptive self-defence only exacerbated the controversies.

There are two main camps regarding article 51; those writers "who support a wide right of self-defence going beyond the right to respond to an armed attack" and those who argue that the right is a narrow exception to the norm in article 2(4) which only arises after an armed attack occurs. (Gray, 2004:98) The issues are whether the UN Charter preserves customary international law on self-defence and if so, exactly what was that law in 1945? In addition, what constitutes an "armed attack" triggering the right to self-defence? It has been argued that a large scale terrorist attack, similar to the 9/11 attack, involving nuclear devices, would qualify as an "armed attack" giving the victim state the right to defend itself. Furthermore, the right of individual self-defence is not always treated in the same way as collective self-defence even though the distinction between them may not be clear in practice.

The U.S. relied on the concept of collective self-defence to justify using force against Nicaragua in the 1980's; in that instance, the U.S. claimed it was using force to protect El Salvador, Costa Rica, and Honduras. In a famous case brought before the International Court of Justice (ICJ) in 1986, Nicaragua

argued that the U.S. had violated article 2(4) by supporting the military and paramilitary activities of the *contras* opposing the government. The ICJ had to consider whether this was justified under article 51 as collective self-defence. In a decision that has been widely discussed and disputed, the Court decided that U.S. aid to the *contras* in "recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding and directing military and paramilitary actions in and against Nicaragua was a breach of the prohibition against the use of force." (Nicaragua v. United States, ICJ Reports, 1986:14)

Two other doctrines related to self-defence under article 51 have generated considerable debate, even though they are rarely used in practice. The first, the use of force to rescue nationals in a foreign country without that country's consent, occurred in Entebbe, Uganda in 1976 when Israeli forces rescued Israeli citizens who were held on a hijacked plane. During the Security Council debate on the matter, Israel argued that the use of force was justified as the protection of its nationals abroad after an "armed attack," i.e. the hijacking occurred. Only a few states such as the US, the UK, and Israel accept that a legal right to protect nationals abroad exists. (Gray, 2004:127)

The second doctrine is the concept of anticipatory self-defence, which occurs when states claim the right to take action in anticipation of an attack, not merely in response to an attack which has started. (Dinstein, 2001:164) Only a few states, notably the U.S. and Israel, defend the right to use force prior to their territory or forces being attacked and it is rare for this doctrine to be invoked. (Gray, 2004:130) The thesis research revealed that American

legal sources tend to accept that anticipatory self-defence is a valid international law doctrine, while non-American writers doubt whether it qualifies as a part of customary international law. For example, a former legal advisor to the National Security Council, American James E. Baker, wrote, "the concept of anticipatory self-defense is generally accepted as black-letter law by most governments and scholars, notwithstanding" the ruling in the *Nicaragua* case. (Baker, 2007:198) In contrast, Christine Gray, a reader in international law at the University of Cambridge wrote, "It is only where no conceivable case can be made that there has been an armed attack that they (states) resort to anticipatory self-defence. This reluctance expressly to invoke anticipatory self-defence is in itself a clear indication of the **doubtful status** of this justification for the use of force." (Gray, 2004:130) (emphasis added)

Many scholars outside of the U.S. and Israel view anticipatory self-defence as a dangerous concept because of the inherent difficulties in containing it. If an "armed attack" has not occurred, how can one state be certain about the evidence an attack is about to happen? How can the international community judge whether the intelligence presented by a state using force in anticipation of an armed attack was sufficient, and not just a subterfuge? The right to take anticipatory action against a future attack is closely related to the Bush II administration's elaboration of a doctrine of pre-emptive or preventive war. The issues presented by the Bush II administration's use of these doctrines are explored further in later chapters.

As the preceding discussion about articles 2(4) and 51 illustrates, there was controversy regarding the use of force under the UN Charter prior to 9/11. The subsequent reliance by the second Bush Administration on several controversial doctrines of international law to justify counterterrorism measures taken after the attacks only increased the unease with which other states viewed American activities. This research will not attempt to categorize any particular administration's use of force against terrorism as legal or illegal, but will instead describe, compare, and contrast the four administrations' views on using force as a means to prevent terrorism. As this thesis will tend to show, the administration of George W. Bush built its "war on terror" upon foundations from previous administrations, particularly the Reagan administration, and the pattern of executive initiative, congressional acquiescence, and judicial tolerance characterized all four administrations.

Chapter 2
Literature Review

The purpose of this chapter is to critically review and identify areas of controversy in the literature that forms the basis for my research. My research seeks to explore the context in which four administrations used force in response to international terrorism. To accomplish that effectively, it is necessary to examine the phenomenon of modern terrorism and one of the most important constraints on the executive branch of the U.S. government, i.e. law. Legal constraints on the executive branch may be divided into two complementary but usually separate spheres: domestic legal sources that may limit what the executive may lawfully do; and international legal sources that may limit what the U.S. as a state may do lawfully under international law.

The first part of the chapter will focus on the literature discussing the modern forms of sub-state terrorism. Many of the important contributions to the literature on terrorism came from scholarly journals such as *Studies in Conflict and Terrorism* and *Terrorism and Political Violence*, or from international relations journals such as *Foreign Affairs* and *Survival*. The second section will examine the legal sources and commentary, both legal and political, evaluating the executive branch's ability to use force in the field of counterterrorism. Both sections of the chapter will rely on several different types of publications including journals, books, government documents, and official reports.

Terrorism

Some of the exhaustive literature on terrorism will be reviewed in this section although it is important to note that the topic of my research, which combines terrorism with legal constraints on the modern presidency, inevitably narrows the selection of literature on terrorism. Scholarly works on the psychology of the factors influencing who may become a terrorist are not reviewed, nor are the numerous works exploring the important nexus between the media and terrorism, as they are not directly relevant to the overall research questions. The research questions focus on non-state terrorism and the particular reactions of various administrations to acts committed by sub-state agents against the U.S. Therefore, cases of state terrorism where the state engages in terror for internal control or repression, or for external aggression, are by definition not part of this analysis. In addition, it is tempting to organize the terrorism section chronologically with a "before 9/11" list and an "after 9/11" list of works based on the enormous impact that attack had on the literature about terrorism. Indeed, one of the most prolific writers on terrorism prior to 9/11, Walter Laqueur, explained in his book *No End to War* that "After 9/11 there was a veritable explosion of books and articles on terrorism; on the first anniversary, many academic journal published special issues devoted to this subject, including both analysis and policy recommendations by leading political science theorists. While this new interest in a hitherto neglected field was welcome, the value of these contributions was not obvious. They reminded one all too often of a medical diagnosis by a leading physician of a patient with whom the doctor had had no

direct contact." (Laqueur, 2003: 251-252). The strictly chronological approach to literature on terrorism is not adopted here.

Instead, the literature on terrorism after 1980 may be organized around the issue of whether the phenomenon of terrorism is properly categorized as an act of war, a criminal act, or something sui generis. As illustrated in subsequent chapters, frequently, an administration's policy preferences for counterterrorism are correlated to the administration's views on whether international terrorism was best characterized as an act of war or a criminal act. The year 1980 serves as a watershed of sorts because Ronald Reagan was elected in November of that year, partially as a result of the inability of President Carter to end the hostage crisis in Iran, which began on November 4, 1979 when radical Islamic students took over the U.S. embassy in Tehran. Reagan, in contrast to Carter, was perceived by the American public as better able to handle international terrorism and promised a new policy of "swift and effective retribution" against terrorists, discussed in greater detail in the chapter on Reagan. With Reagan's election, writers analyzing international terrorism and policy makers in his administration began referring to acts of terrorism as *acts of war.* Since that time, the argument has been that acts of war require different and more militarized responses than criminal acts.

Most of the terrorism literature begins with a chronicle of the struggle to define terrorism; as noted in the introduction, there are at least 109 definitions. Alex Schmid, one of the early scholars on terrorism, developed a definition based on academic consensus which is widely used and quoted:

> *Terrorism is an anxiety-inspiring method of repeated violent action, employed by (semi-) clandestine individual, group or state actors, for idiosyncratic, criminal or political reasons, whereby - in contrast to assassination - the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat- and violence-based communication processes between terrorist (organization), (imperiled) victims, and main targets are used to manipulate the main target (audience(s)), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought*. (Schmid, 1988: 28)

Walter Laqueur, another early scholar of terrorism, wrote of his long-standing scepticism that a definition of terrorism was possible in light of the heavy social and political consequences tied to the use of the word. According to Laqueur, "The character of terrorism tended to change in time and space. What was true for one terrorism movement in a certain country during a given period did not necessarily apply to a group in another country, at another time, heir to different politics and traditions." (Laqueur, 2003: 139) In his book on the subject, *Inside Terrorism*, Bruce Hoffman traced the changing meaning of terrorism from the French Revolution to modern times, noting that the term has acquired negative connotations to the point where modern terrorist groups try to avoid being labelled as "terrorists." Hoffman also articulated a definition of state-sponsored terrorism, a term that became quite important during the Reagan administration. According to Hoffman,

state-sponsored terrorism is “the active and often clandestine support, encouragement and assistance provided by a foreign government to a terrorist group.” (Hoffman, 1998: 23)

Other scholars have pointed out the obvious truism that generally speaking, like pornography, people know terrorism when they see it. Some have even questioned the utility of the long quest for a definition of terrorism, preferring instead to focus on its main characteristics. These typically include the following:

- Demonstrative use of violence
- Threat of further violence
- Deliberate production of terror in a target group
- Frequent targeting of civilians and non-combatants
- Purpose is to intimidate, coerce, or spread propaganda
- Act is predominantly political
- Act is a tool of psychological warfare (Schmid, 2005: 140)

Martha Crenshaw, another early scholar of terrorism who examined the National Liberation Front and the use of terrorism during the Algerian war against France, began *Terrorism in Context* by noting, “Attempts to specify the unique qualities of terrorism and to establish the boundaries between terrorism and other forms of political violence invariably provoke dispute.” (Crenshaw, 1995: 4) She correctly highlighted the point that terrorism is related to the social, political, and economic environment but the links between violence and historical conditions vary and “no analyst would claim that specified sets of conditions invariably produce terrorism.” (Ibid) After

decades of teaching courses on terrorism, Crenshaw joined the Center for International Security and Cooperation at Stanford University and edited a book in 2010 about the costs of counter-terrorism. *The Consequences of Counterterrorism* compared the reactions of various states such as the UK, France, Germany, Spain, Japan, and Israel to acts of terrorism to explore the costs and benefits of different approaches to counterterrorism.

Some of the scholars of terrorism in the 1970's and 1980's began to explore other aspects of the problem, reasoning that if the phenomenon of terrorism could not be defined with enough precision to satisfy social scientists, politicians, and the public, then other aspects of terrorism merited analysis. For example, Walter Reich, a former psychiatrist at the National Institute of Mental Health, edited an important book entitled *Origins of Terrorism* examining the psychologies of terrorism. In his book, Reich, a senior scholar at the Woodrow Wilson Center for Scholars, acknowledged the utility of studying psychological accounts of terrorism but nevertheless cautioned that it was "futile" to "attribute simple, global, and general psychological characteristics to all terrorists and all terrorisms." (Reich, 1998: 263) After the 9/11 attacks and other attacks involving suicide terrorism, scholars such as Robert Pape at the University of Chicago built on Reich's approach and explored suicide terrorism campaigns from 1980 to 2003. In his book, *Dying to Win: The Strategic Logic of Suicide Terrorism*, Pape distinguished suicide terrorism from demonstrative or destructive terrorism and argued that at the strategic level, suicide terrorism was intended to exert coercive power on democracies to cease a foreign occupation. Thus, the high rates of suicide attacks against American troops since 9/11 were best

explained, according to Pape, not by the ideology of Islamic fundamentalism, but rather as responses to foreign military occupation.

Other scholarly works on terrorism have focused on how states respond to sub-national terrorism by noting the asymmetric nature of the violence employed and its effect on the victim state. In an influential article in the July 1975 issue of *Foreign Affairs*, David Fromkin detailed the strategy of terrorism, noting that it is a "sort of jujitsu" in which an opponent's own strength is used against him by the terrorist group. "By itself, . . . terror can accomplish nothing in terms of political goals; it can only aim at obtaining a response that will achieve those goals for it." (Fromkin, 1975: 11) Decades before the second Bush administration launched a "war on terror" in response to 9/11, Fromkin was insightfully focusing on the critical question of how to respond to terrorism without inadvertently achieving the goals of the terrorists. My research incorporates Fromkin's analysis and examines how the use of force, usually perceived as an American strength, may result in unintended and largely negative results in the four administrations. The question of appropriate response to terrorism, which underlies Fromkin's article, arises throughout the four administrations and guided the research.

Other noted scholars of terrorism have attempted to explain the origins of terrorism by exploring the history and specific actors engaged in terrorism. For example, J. Bowyer Bell meticulously interviewed many actors involved with the IRA in Ireland and then wrote a history of the IRA entitled *The Secret Army*. In addition, he also extensively interviewed many involved in the Jewish underground in Palestine and the formation of Israel when he wrote *Terror out of Zion.* His last book was *Murders on the Nile: The World*

Trade Center and Global Terror in which he sought to explain the emergence of *jihadi* defined as "fundamentals who insist that an armed crusade against either the corrupt Islamic regimes or the infidels, especially the West and the United States in particular, is the only way to achieve a just Islamic society." (Bell, 2003: 181) According to Bell's analysis, many of the answers can be found in the last one hundred years of history in Egypt where sheikhs and imams have been preaching holy war as a means of creating a perfect Islamic society. Bell identified Sheikh Omar Abdel Rahman, the so-called "blind sheikh" imprisoned for his role in the 1993 World Trade Center bombing, as a particularly potent source of the anti-Western rhetoric and inspiration for terrorist conspiracies against the U.S. and its allies. However, one shortcoming of Bell's last book is his neglect of the discussion of the range of appropriate responses to the religiously inspired terrorists confronting the American government and its allies.

The *Historical Dictionary of Terrorism* by Sean Anderson and Stephen Sloan provided a useful reference guide for the study of terrorism; the third edition of 2009 included valuable information about al Qaeda and its related affiliates. It also included a discussion of the role of the internet in the changing face of terrorism. The authors based their dictionary on a typology, which divided the types of terrorist objectives into three categories: repressive, revolutionary, and limited, and classified types of terrorist actors as state, revolutionary, or entrepreneurial. (Anderson and Sloan, 2009: 20) They also meticulously set forth a list of abbreviations and a chronology of terrorist incidents and personalities, along with an extensive bibliography to guide research.

Long before terrorism became a popular topic for research, Brian Jenkins was examining aspects of terrorism and groups that embraced it while advising RAND about the implications of terrorism. Jenkins is well known for his analysis and for his pre-9/11 quote that "terrorists want a lot of people watching, not a lot of people dead" which correctly summarized the desire of terrorist groups in the 1970's and 1980's for publicity. He frequently noted the relationship between communications technology and the rise in modern terrorism. Beginning in 1974, he examined the possibility of "nuclear terrorism," the frightening prospect that terrorists might use a nuclear weapon either to blackmail governments, or simply for maximum shock value on civilian populations unprepared for nuclear war. Although the prospects and potential of WMD use by terrorists are beyond the scope of the current research, the use of WMD as a reason to expand the war on terror into Iraq is central to the history of the second Bush administration. In this context, Jenkins' book *Will Terrorists Go Nuclear?* which was written in 2008, was illuminating for its ability to discuss rationally the threat of nuclear terrorism. In addition, the book draws attention to the debilitating effects of fear on the formulation and implementation of effective counterterrorism policy. Jenkins writes, "After 9/11, the government relentlessly promoted a message of fear, declaring that next time around, terrorists could be armed with nuclear weapons." (Jenkins, 2008: 213) He contrasts this message of fear with Franklin Roosevelt's assurances in an earlier age that "the only thing we have to fear is fear itself." (Ibid) Building on Jenkins' work, this research expands on the second Bush administration's use of the general public's fears regarding WMD possession by al Qaeda in the chapters on George W. Bush.

The Crime versus War Dichotomy

As the number of terrorists incidents involving Americans or American interests expanded in the late 1970's, the search for effective countermeasures became more urgent. Some scholars and policy-makers in the U.S. and Israel began to advocate for more forceful responses due, in part, to their view of terrorism as more like a *war*, with its signature violence and indiscriminate killing, than a *crime*, where the primary motive is often economic. According to this view, treating terrorism as a crime (and by implication, terrorists as criminals) was ignoring its true nature and was not effective because it would preclude proactive measures which were necessary to protect the institutions of the state and retain public confidence in the workings of government. An example of the literature advocating a fully militarized response to terrorism, based on the assumption that terrorists are actually waging a war is *Terrorism: How the West Can Win* (1987), edited by Binyamin Netanyahu, the current prime minister of Israel. According to Netanyahu, states that are "neutral" regarding international terrorism need to be forced to take a stand against it; foreshadowing President George W. Bush's words, *you're either with us or against us*. Netanyahu wrote there is no "middle ground of neutrality" in the war against terrorism. (Netanyahu, 1987: 219) The salience of the crime versus war debate was renewed after the September 11 attacks with many policy-makers in the Bush II administration, like those in the Reagan administration, clearly viewing terrorism as an act of war, requiring much more than the "ordinary law enforcement" approaches.

Many of the authors of literature on terrorism discussed previously mention the problem of formulating appropriate responses to acts of terrorism,

but none dissects and analyzes this issue in as much depth as Paul Wilkinson did in his numerous books and articles. The problem of how a liberal democracy such as the United States should response to acts of international terrorism lies at the heart of this research, so Wilkinson's analysis was particularly important to the overall direction of this thesis. The books *Terrorism and the Liberal State* (1977 and 1986) and *Terrorism versus Democracy: the Liberal State Response* (2001 and 2006) were especially useful in reviewing the use of force by the four administrations in this study. As some members of the Reagan administration began to call for forceful military responses to international terrorism and Reagan himself announced a "war" on terrorism early in the 1980's, Wilkinson rejected such an approach as counter-productive. According to Wilkinson, "there were some strident voices in Washington demanding what was misleadingly called 'proactive' measures against such states (referring to states that sponsor terrorism), by which was apparently meant the bombing of terrorist training centres and bases, or even the removal of the regime by force. If such dangerous policies were ever implemented they would not eradicate international terrorism. They would only succeed in substituting the greater evil of full-scale war, with all its attendant death and devastation and dangers of escalation, for the lesser evil of terrorism." (Wilkinson, 1986: 282-283)

Long before al Qaeda dominated the literature on terrorism, Wilkinson studied the conundrum facing liberal democracies confronted by sustained campaigns of terrorism: how to protect and defend the democratic institutions of the state against terrorists without sacrificing essential liberties and the rule of law in the process. His advice to democratic states was to maintain democratic institutions without over-reacting to the threat of terrorism and not

to rely exclusively on "military solutions" which would "encourage the very anarchy in which terrorism flourishes." (Wilkinson, 1986: 299) In the second edition of *Terrorism versus Democracy*, Wilkinson examined post 9/11 efforts to combat terrorism and noted that there were three dimensions to counterterrorism: the use of politics and diplomacy; the use of law enforcement and criminal justice systems; and the role of the military. (Wilkinson, 2006: 61) Unlike other commentators who view these dimensions as "alternative models," Wilkinson clearly maintained they were not mutually exclusive and should be skilfully applied together. (Ibid) In addition, he cautioned against "under-reaction," or toleration of terrorism, and "draconian overreaction, leading to serious infringement of civil liberties." (Wilkinson, 2006: 203) He also reaffirmed the principles he first identified in *Terrorism and the Liberal State* as instrumental in improving measures against terrorism; these include defeating terrorism within the "framework of the rule of law and the democratic process" and bringing terrorists to justice "by prosecution and conviction before courts of law." (Wilkinson, 2006: 207) Thus, while acknowledging that the armed forces could be useful in counterterrorism, Wilkinson remained firmly convinced that waging "world war against terrorism" was the wrong approach.

Another noted academic in the field of terrorism who counselled against the war paradigm, Louise Richardson, was "struck by how futile counterterrorist policies are likely to be when they are based on a view of terrorists as one-dimensional evildoers." (Richardson, 2007: xii) In her book, *What Terrorists Want*, Richardson criticized the "war on terror" approach of the second Bush administration and examined the motives of terrorists with the objective of better formulating more effective responses to terrorist

campaigns. According to Richardson, “terrorists are motivated by both long-term political objectives and short-term immediate objectives and that the most powerful of these are the three Rs of Revenge, Renown, and Reaction” (exacting revenge, attaining renown, and eliciting a reaction). (Richardson, 2007: 106) She argued that the “war on terror” could never be won and that by responding to the 9/11 attacks with a declaration of war, the Bush II administration “played right into the hands of the terrorists.” (Richardson, 2007: 199) Instead of a “war on terror” reaction, Richardson advised the U.S. government to pursue a more nuanced approach, which was based upon other countries’ experiences with terrorist campaigns and incorporated the following rules:

- Have a defensible and achievable goal
- Live by your principles
- Know your enemy
- Separate the terrorists from their communities
- Engage others in countering terrorists with you
- Have patience and keep your perspective

(Richardson, 2007: 200-239). As the chapters on George W. Bush document, the likelihood of the administration pursuing this approach was extremely limited due to the high concentration of administration members who articulated the parameters of the problem as one of waging war.

Richardson evaluated counterterrorism from a pragmatic point of view asking the question, what works best in combating terrorism? However, this is not the only way an administration formulates counterterrorism policy, which

is part of its overall foreign and security policies. Other goals such as projecting U.S. power around the globe or enlarging the powers of the executive branch may be combined with the goal of eliminating terrorist attacks. In this regard, the counterterrorism objectives of members of the second Bush administration, particularly Vice President Cheney, are relevant and will be discussed in latter chapters.

Abraham Sofaer is one of the most prolific writers on the subject of terrorism and the law; he was the Legal Advisor to the Department of State from 1985 to 1990 and heavily influenced the Reagan administration's views on the use of force in response to international terrorism. In the 1980's he was critical of UN efforts to agree on international methods to reduce terrorism; in an article in *Foreign Affairs* Sofaer wrote, "international law has been systematically and intentionally fashioned to give special treatment to, or to leave unregulated, those activities that cause and are the source of most acts of international terror." (Sofaer, 1986: 922) Sofaer also justified the use of force by the Reagan administration when it bombed Libya in April 1986 as an act of self-defence arguing, "National self-defense is the only protection against the criminal state." (Ibid) Sofaer and Reagan's Secretary of State, George Shultz, foreshadowed proponents of "going on the offense" against terrorism in the second Bush administration when they advocated an "active defense" against terrorism, arguing that the U.S. could lawfully use force to prevent, preempt, and deter further attacks. It remains unclear to what extent the option of "going on the offensive" or an "active defense" is available to states other than the United States.

After the 9/11 attacks, Sofaer, now at the Hoover Institution, supported the Bush II administration's embrace of the concept of preventive action with the "objective of preventing terrorist threats before they are realized---rather than primarily treating terrorism as a crime warranting punishment after the fact." (Sofaer, 2010a: 109) He criticized the UN Charter rules on the use of force as inadequate in light of modern realities and non-state actors because, in Sofaer's view, these rules "effectively protect terrorists, proliferators, and irresponsible states." (Sofaer, 2010a: 111) His solution was to propose a set of "guidelines" that, while not strictly lawful under UN Charter rules, remain true to the Charter's purposes of maintaining peace and security. Under Sofaer's guidelines on the use of preventive force, a state could use force against non-state actors in a foreign state without permission to prevent a terrorist attack even if there is no UN authorization as long as the use of force complies with the overall purposes of the UN Charter. His book, *The Best Defense? Legitimacy & Preventive Force* expanded upon these guidelines. While Sofaer's analysis was facially persuasive in that it was based broadly on UN Charter purposes, the flaw lies in the fundamental notion of what state should properly judge the appropriateness of the application of preventive force (*Nemo iudex in causa sua*: no one should be a judge in their own cause). The implicit premise of Sofaer's guidelines allowed the U.S. (not the international community speaking through the UN) to judge the appropriateness of its own use of force, a prospect that, if accepted by the international community, could shift the use of force regime perilously back to pre-UN Charter days.

Two books, which had relatively little impact in academic circles, but a larger effect on policy-makers, are *The Terror Network* by Claire Sterling and

Study of Revenge: Saddam Hussein's Unfinished War Against America by Laurie Mylroie. Both books remain controversial and were used by various administration officials to articulate the terrorism-as-war paradigm to advocate forceful military measures in response to terrorism. The first book, *The Terror Network*, was written in 1981 by an American expatriate journalist who theorized that there was an international terrorist network operating worldwide that received extensive aid from the Soviet Union and its satellite states. The CIA had long noted the trend towards greater cooperation among certain terrorist organizations including, for example, the Baader-Meinhof Gang and Black September. However, Sterling went further than this in *The Terror Network*, arguing that there was more than cooperation; the Soviet Union was using terror to fight the West by proxy. States such as Libya, Iran, and Syria were being aided by the communist world to wield terrorism as an instrument of foreign policy. According to Sterling, "The terrorists' primary value to the Kremlin lay in their resolute efforts to weaken and demoralize, confuse, humiliate, frighten, paralyze, and if possible dismantle the West's democratic societies." (Sterling, 1981: 277) For Sterling, Libya's Qaddafi was the "Daddy Warbucks of terrorism." (Sterling, 1981: chapter 14) This complemented the Reagan administration's view that Libya under Qaddafi was one of the most dangerous state sponsors of terror. William Casey, the first CIA director during Reagan's administration, not only admired Sterling's book but also strongly advocated treating international terrorism as warfare.

The second book, *Study of Revenge: Saddam Hussein's Unfinished War Against America*, was published in 2001 by the controversial author Laurie Mylroie who once advised President Clinton during his 1992 election campaign. She later joined the conservative American Enterprise Institute as

an adjunct fellow and once held faculty positions at Harvard University and the U.S. Naval War College. Mylroie co-wrote *Saddam Hussein and the Crisis in the Gulf* in 1990. Mylroie's books were often cited by neoconservatives as evidence that Saddam Hussein was an imminent threat to the U.S. because her 2001 book argued that Hussein was behind the 1993 bombing of the World Trade Center, in addition to several other failed plots to destroy the Lincoln and Holland tunnels in New York City. According to Mylroie, Saddam Hussein was the predominant threat because he was engaged in an undercover war of terrorism against the U.S. This was contrary to the views of some terrorism experts in the 1990's who wrote about a "new" kind of terrorist threat emanating from Islamic fundamentalists. These experts discounted the possibility of Iraqi state sponsorship of Islamic fundamentalist terrorism. However, Mylroie theorized that, Abdul Basit, also known as Ramzi Yousef, one of the men convicted for the 1993 WTC bombing, was an Iraqi intelligence operative, thereby illustrating Saddam Hussein's continuing desire to sponsor terrorism and hurt the U.S. with terrorist strikes. Her theories were heavily criticized, even by some analysts who argued that there were important ties between Iraq and radical Islamists.

Despite the criticism levelled at Mylroie's theories, they continued to exert influence on policy-makers in the second Bush administration. In his book *Against All Enemies*, Richard Clarke, the counterterrorism coordinator for both the Clinton administration and Bush II administration, detailed how Deputy Defense Secretary Paul Wolfowitz relied on Mylroie's theory of a Saddam Hussein-1993 WTC bombing connection to argue that there must be Iraqi involvement in the September 11 attacks. (Clarke, 2004: 232) Clarke was incredulous that Mylroie's theories would get a serious hearing by any

one in a position to influence national security policy. Peter Bergen, reviewing the events that resulted in the U.S. invasion of Iraq in 2003 in *The Longest War*, examined the role of Mylroie's theories on Iraqi involvement in anti-American terrorism. He called Mylroie's views a "unified-field theory of terrorism" that heavily influenced members of the Bush II cabinet including Rumsfeld and Cheney. (Bergen, 2011: 135) This occurred despite the fact that the U.S. State Department concluded in 2000 that Iraq did not attempt any "anti-Western attack since its failed attempt to assassinate former President Bush in 1993 in Kuwait." (Bergen, 2011: 136) In light of these facts, Bergen posed the question of whether the neoconservatives in the Bush II administration were genuinely convinced by Mylroie, or whether they approved of her theory of an Iraqi-terrorism link because the theory fit very well with their desire to overthrow Saddam Hussein. (Ibid) In any event, Mylroie's opinions formed part of the academic foundations for the war in Iraq.

Literature on al Qaeda

The literature examining the origins, goals, and composition of al Qaeda and other religiously motivated terrorist movements increased dramatically after the September 11 attacks, as scholars and others sought to capitalize on the interest in terrorism generated by the tragedy. Not all the literature is of the same quality and my emphasis is on the reactions of various administrations to international terrorism, so this section is, by necessity, only a small selection of works about al Qaeda that was instrumental to this research. The first piece of literature provided background and context to the establishment of al Qaeda as the top national security threat facing the Bush II administration. Steve Coll won a Pulitzer Prize in 2005 for his in-depth review

of the history of U.S. involvement in Afghanistan; the book is entitled *Ghost Wars: The Secret History of the CIA, Afghanistan, and Bin Laden, from the Soviet Invasion to September 10, 2001*. No other piece of recent literature examined and documented the covert wars and secret operations in Afghanistan as well as this book. Coll, currently President at the New America Foundation, explained how the Soviet invasion of Afghanistan in December 1979 sparked American interest in helping the Afghan resistance expel the invaders. American policy-makers in the 1980's believed it was in the interests of the U.S. to fund and train the mujahedin who were fighting the better-equipped army of the Soviet Union; the potential of Islamic fundamentalism threatening the West was not appreciated until radical Islamists in the form of the Taliban were governing Afghanistan. Coll detailed the response of presidents from Carter to George W. Bush to the complex history of Afghanistan and the role played by outside forces including the USSR and Pakistan. Coll's account, although quite thorough, did not attempt to offer any alternative models to the U.S. pattern of involvement in Afghanistan during the past 35 years.

On the other hand, Bruce Riedel offered policy options and preferred models for containing the threat posed by al Qaeda in his book, *The Search for Al Qaeda: Its Leadership, Ideology, and Future.* Now at the Brookings Institution, Riedel spent nearly 30 years in the CIA and participated in formulating national security policy on the Middle East and South Asia under several administrations. Written in 2008, prior to the start of the Obama administration, *The Search for Al Qaeda* bluntly challenged some of the conventional wisdom supported by the Bush II administration regarding the threat from al Qaeda and its leadership. For example, Riedel categorized the

war in Iraq as a “quagmire” (not, as President Bush called it, the central front in the war on terror) and noted that al Qaeda leaders’ objectives include draining the U.S. in “bleeding wars” in the same manner that the mujahedin defeated the Soviet Union in Afghanistan. One of Riedel’s reasons for explaining al Qaeda and its ideology was his belief that knowledge of the enemy is an important first step in defeating it. In this regard, Riedel wrote, “the public’s ignorance and vulnerability are a result of a decision by the George W. Bush administration not to clearly explain to the American people the nature of the enemy, namely al Qaeda.” (Riedel, 2008: 2) Throughout the book, Riedel maintained that failure to resolve the Israeli-Palestinian issue fed into Osama bin Laden’s narrative that the West was determined to subjugate Muslims and steal their lands.

The contrast with the official position of the second Bush administration could not be starker: the administration always downplayed the significance of the Palestinian issue regarding al Qaeda’s motivations. Another book challenging conventional wisdom about the motivations and operating methods of al Qaeda was *Holy War, Inc.* by Peter Bergen. Like Riedel, Bergen attempted an in-depth examination of Osama bin Laden and his organization by accessing and utilizing bin Laden’s own words concerning his motivations and objectives. Both Riedel and Bergen insisted in their books that al Qaeda declared war on the U.S. not because of disapproval of “American values,” but due to specific American policies in the Middle East.

Bergen also examined the organizational structure of al Qaeda and theorized that it was similar to a corporation that managed to merge the utilization of modern technology with an ideology built upon fundamentalist

Islam. He opposed a simplistic application of the notion of a "clash of civilizations" from Samuel Huntington as an explanatory narrative for the rise of al Qaeda and argued that "treating 'Islam' as a monolith defies common sense." (Bergen, 2002: 228) Bergen produced a notable television interview with bin Laden in 1997 for CNN in which bin Laden praised jihad against the U.S. and warned that civilians were suitable targets in his holy war. (Bergen, 2002: 20) Currently Bergen is co-editor of the AfPak Channel, which is a joint publication of Foreign Policy magazine, and the New America Foundation. After *Holy War, Inc.*, Bergen continued his analysis of al Qaeda in *The Osama bin Laden I Know (an Oral History)* in 2006 and *The Longest War* in 2011. All three of these books provided nuanced details and context for this research. In addition, Bergen agreed to be interviewed for this thesis.

Another work that examined the origins and structure of al Qaeda along with its ideology was written by Jason Burke, a British journalist with extensive experience in the Middle East. *Al Qaeda: the True Story of Radical Islam* explored the roots of Islamic militancy and described how a "key element" of al Qaeda's successful discourse was the manner in which it "combines so many elements of preceding ideologies." (Burke, 2004: 40) Burke noted that using the term "al Qaeda" is often a "messy and rough designation" for what has become, for many alienated Muslims, a methodology or precept for a way of seeing the world. (Burke, 2004: 290) The al Qaeda worldview both explains the current situation of political, economic, and social decay in some Islamic countries and presents a call to action that appeals to some Muslims attempting to understand the challenges of modernization and globalization. Burke, who wrote the book after the invasion of Iraq in 2003, was critical of the approach taken by the U.S. in the "war on terror." He cautioned, "every time

force is used it provides more evidence of a 'clash of civilizations' and a 'cosmic struggle' and thus aids the militants in their effort to radicalize and mobilize. By strengthening the warped vision of the world that is becoming so prevalent, every use of force is another small victory for bin Laden and those like him." (Ibid) Taken together, the books by Peter Bergen and Jason Burke provided background information on al Qaeda, its various adherents, and its networks and offered extensive bibliographies and footnotes to facilitate further research.

In *Messages to the World: The Statements of Osama bin Laden*, edited and introduced by Bruce Lawrence, bin Laden's actual speeches and writings were translated into English. Lawrence commented in the introduction that bin Laden is "not an original thinker," nor is he "an outstanding Qur'anic scholar." (Lawrence, 2005: xvi) However, bin Laden does use "the authentic, compelling voice of a visionary, with what can only be called a powerful lyricism." (Lawrence, 2005: xvii) Lawrence also argued that bin Laden had a "personal reputation for probity, austerity, dignity, and courage" that contrasted sharply for many Muslims with the "mismanagement" of most Arab regimes. (Ibid) The book began with bin Laden's statement to religious leaders in Saudi Arabia about the "betrayal of Palestine" on December 29, 1994 and concluded with bin Laden's December 16, 2004 message to Muslims to "depose the tyrants" of various Muslim lands. In his message to the people of Iraq on February 11, 2003, bin Laden was eerily accurate in his description of tactics that would endanger the American and allied troops in Iraq. For example, bin Laden recommended, "dragging the enemy forces into a protracted, exhausting, close combat, making the most of

camouflaged defence positions in plains, farms, hills, and cities." (Lawrence, 2005: 183) According to bin Laden, "What the enemy fears most is urban and street warfare, in which heavy and costly human losses can be expected." (Ibid) He also praised "martyrdom operations" for their ability to inflict harm on the U.S. and its allies. (Ibid) *Messages to the World: The Statements of Osama bin Laden* conveyed the al Qaeda leader's worldview and perspectives on the issues causing much of the political turmoil in the Middle East using bin Laden's own words. The book furnished important insights and sources for the research on al Qaeda.

In *The Age of Sacred Terror: Radical Islam's War Against America*, two former members of the National Security Council, Daniel Benjamin and Steven Simon, discussed the changing nature of international terrorism and provided insider details regarding the U.S. government's efforts to track and contain the al Qaeda network. The idea for their book began in 1999, when the threat of a "new" type of terrorism, that of a religiously-inspired and loosely-organized network, was not universally accepted by either terrorism experts or foreign relations commentators. As noted above, many in the terrorism-as-war school of thought exemplified by Laurie Mylroie argued that state involvement was intricately part of any major incident of international terrorism directed against the U.S. The tragedy of September 11 overtook their book proposal and the book that was subsequently written examined the acts and omissions that led to the failure to anticipate the 9/11 attacks. Benjamin and Simon began the book with an intellectual history of al Qaeda and then detailed their work within the Clinton administration to contain it. Their discussions of the powers of the executive branch regarding counterterrorism are particularly relevant to the chapters on the Clinton and

Bush II administrations. When the Bush II administration took over in January 2001, according to Benjamin and Simon, problems recognizing the challenges posed by al Qaeda were acerbated by members of the new administration who "did not appreciate new threats such as terrorism that had arisen in the 1990's, and they were fixated on a missile defense system" (Benjamin and Simon, 2003: 336).

In addition, characterizations of key agencies tasked with terrorism prevention and detection are revealing in *The Age of Sacred Terror*. For example, they wrote, "Of the core agencies in the counterterrorism community, the one least troubled by the rise of al-Qaeda was the FBI." (Benjamin and Simon, 2003: 296) Incidents illustrative of the FBI culture pre-9/11 are also part of Lawrence Wright's book, *The Looming Tower: Al*-Qaeda *and the Road to 9/11*. According to Wright, Louis Freeh, the FBI director from 1993 until June 2001, "was bored by technology. One of his first actions on taking office in 1993 was to jettison the computer on the desk. The bureau was technologically crippled even before Freeh arrived, but by the time he left not even church groups would accept the vintage FBI computers as donations." (Wright, 2006: 237) Wright's book traced the lives of some of the most important men in the al Qaeda movement including theoreticians such as Sayyid Qutb and Ayman al-Zawahiri, in addition to an examination of what the U.S. government did and failed to do in the decade prior to the 9/11 attacks. Taken together *The Age of Sacred Terror* and *The Looming Tower* provide important, detailed information about the causes of 9/11, the al Qaeda network, and the counterterrorism strategies pursued by the Clinton and Bush II administrations.

The ultimate, official source on the 9/11 attacks remains *The 9/11 Commission Report* published in 2004 by the National Commission on Terrorist Attacks upon the United States. A companion book is *The 9/11 Investigations: Staff Reports of the 9/11 Commission,* which contains selected excerpts from the House-Senate joint inquiry report on 9/11 and testimony from key witnesses such as CIA Director George Tenet and National Security Advisor Condoleezza Rice. Both books resulted from sustained pressure on the Bush II administration applied by the families of victims to investigate the 9/11 tragedy. With their extensive notes and appendixes, both books were invaluable to the research in this thesis. The chairpersons of the 9/11 Commission were Thomas Kean, a Republican, and Lee Hamilton, a Democrat, and this is a symptom of a larger problem with the Commission: it was intended to be strictly bipartisan to garner maximum support from all sides of the political spectrum. The tendency throughout the report is to evenly criticize both the Clinton and Bush II administrations for "system failures" which led to the 9/11 attacks. In essence, the effect of blaming the "system" is to blame everyone slightly, while avoiding outright blame on any person or administration. Richard Clarke, former head of counterterrorism at the National Security Council, wrote in the *New York Times*, "because the commission had a goal of creating a unanimous report from a bipartisan group, it softened the edges and left it to the public to draw many conclusions." (Clarke, 2004a) According to Clarke, one of the "obvious truths" was that the Bush II administration "did little on terrorism before 9/11." (Ibid)

Moreover, other critics charge that *The 9/11 Commission Report* was too deferential to President Bush and Vice President Cheney; they were

questioned by the Commission on April 29, 2004, but neither man was under oath, they were questioned together in private, and their testimony was not recorded. (Thompson, 2004: 533) Some observers compared *The 9/11 Commission Report* to the infamous Warren Commission (which concluded that Lee Harvey Oswald acted alone when he assassinated President Kennedy) and contended that much more involving the 9/11 conspiracy remains to be investigated. (Thompson, 2004: 563-568) Despite the criticisms, *The 9/11 Commission Report* is widely cited and its recommendations regarding the organization of the US national security apparatus are the starting point for many discussions on improving it.

The Use of Force: International and Domestic Legality

The following section reviews some of the most pertinent literature on the use of force and its legality, both on the international level and domestically, according to American law. The issue of using force in counterterrorism is multifaceted in that it involves international legal sources, if the use of force occurs abroad, and domestic authorizations for the use of force. Therefore, the questions are whether the use of force is authorized (or at least not prohibited by), the international regime on the use of force, and whether U.S. law permits the President to use force in the particular circumstances. As will be examined in further chapters, usually the inquiry resolves itself in this manner: the U.S. claims the use of force was lawful according to Article 51 of the UN Charter which permits self-defence under international law, and the White House maintains the President was authorized to use force against terrorism without consulting with Congress because he is given the powers of the Commander-in-Chief in the U.S.

Constitution. In addition, during the Bush II administration, Congress specifically authorized the use of force in both Afghanistan and Iraq, which the administration interpreted broadly.

The first source regarding international legality in this inquiry is the UN Charter, specifically Articles 2(4) and 51, which formulate the basis for the legal use of force in international law. Both articles are analyzed in depth in numerous articles and books; my research began with the following legal textbooks: *International Law* by Carter and Trimble; *Principles of Public International Law* by Brownlie; and *International Law and World Order* by Weston, Falk and D'Amato. These traced the norms regulating the resort to force from "Just War" theories to the signing of the UN Charter in 1945 and beyond. They contained excerpts of cases interpreting the meanings of various UN resolutions and Charter articles, but due to their general emphasis, did not provide great focus on the issue of using force in response to international terrorism. For that aspect of the research, Baker's book *In the Common Defense*, Murden's *The Problem of Force*, and *National Security Law* by four law professors examined the legal issues regarding the use of force in counterterrorist operations.

Several books specifically explored the use of force under international law since the end of the Second World War. The first, *War, Aggression and Self-Defence* by Yoram Dinstein, is an often-cited book in its fourth edition, newly expanded with material on the use of force in Afghanistan and Iraq. Dinstein discussed how the Bush Doctrine "appears to push the envelope by claiming a right to preemptive self-defence" but he added that this might have no effect practically because this was not the rationale applied in 2003 in Iraq.

He argued that this would not comply with Article 51 of the UN Charter, but maintained the use of force in Iraq was lawful because it was simply the disintegration of the cease-fire that suspended the hostilities of the first Gulf conflict. (Dinstein, 2005: 297) Dinstein's clear and forceful analysis was useful because it required realistic application of Article 51 to real sets of facts.

International Law and the Use of Force by Christine Gray explored the international legal issues involving states using force to fight terrorism post 9/11. Gray discussed the intense debates among states regarding self-defence in the period between 9/11 and the invasion of Iraq in March 2003 and concluded that the only two states to initially contribute forces to the Iraq conflict, the UK and Australia, "did not use pre-emptive self-defence as any part of their legal case for the invasion." Instead, these countries relied on UN Security Council authorization, a stance that indicated doubt about the doctrine of pre-emptive self-defence. Her conclusion was that the doctrine "remains extremely problematic" and future U.S. administrations may not continue to press this highly controversial concept as a legitimate doctrine under international law.

Another book on the subject of the use of force under international law is *Recourse to Force* by Thomas Franck. Franck, a former president of the American Society of International Law, noted that the drafters of the UN Charter were more concerned in 1945 about peace than about justice; he then explored how the tension between these two values has affected the functioning of the Charter. He also examined how legal systems, both domestic and the international one, attempted to "bridge the gap between

what is requisite in strict legality and what is generally regarded as just and moral," using NATO's actions in Yugoslavia in 1999 as an example. How the law adapts to changing circumstances and unforeseen conflicts may explain how the norms governing the use of force are evolving in the post 9/11 climate, according to Franck.

A more recent work on the subject is *Terrorism and the International Legal Order* (2002) edited by Peter van Krieken. This book was written after the September 11 attacks and incorporated UN treaties and Security Council resolutions on the matter in addition to materials from the European Union. Another useful source was the book *Legal Instruments in the Fight against International Terrorism* (edited by Fijnaut, Wouters, and Naert) which resulted from an international conference in Belgium in 2002. Not surprisingly, there is a split between American and European writers regarding the legality of the invasion of Iraq in 2003; in general, the American commentators were more likely to agree with the Bush II administration that the invasion of Iraq was lawful. Several books examined the intelligence and political background to the invasion, providing in-depth analysis and details; two of the most useful for this thesis were *Intelligence and National Security Policymaking on Iraq: British and American Perspectives* and *The Political Road to War with Iraq*. Where possible, this thesis attempted to identify U.S, European, and other perspectives from around the world on international law and terrorism by consulting as many sources as possible.

The 'War on Terror' and the Framework of International Law by Helen Duffy, the legal director of a human rights non-profit organization, is an

expanded version of an online article. This book provided an extremely thorough and useful overview of the international legal framework governing possible responses to the terror attacks of 9/11. The subjects covered included international criminal law, international humanitarian law, and international human rights in armed conflict, refugees and internally displaced persons. Duffy attempted to analyze the law governing how states may react to a substantial act of international terrorism without advocating any particular position (other than the general advice to apply international law). She also raised many questions regarding how states may respond to terrorism and thus, provided an outline of possible avenues for further research on the subject. A similar project entitled *The Costs of Counterterrorism: Power, Politics, and Liberty* by Laura Donohue compared and contrasted counterterrorism laws in the UK and U.S. Donohue examined certain specific areas in depth, such as financial counterterrorism, privacy, and surveillance, which were beyond the scope of the current research. However, the analysis was instructive and her general argument that counterterrorism laws tend to increase the powers of the executive, whether it is American or British, is an important component to the chapters on George W. Bush. Donohue agreed to be interviewed as part of this thesis.

My research also built upon the work of Jackson Maogoto's book *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror.* For Maogoto, the September 11 attacks and the U.S. response to the attacks represent a new paradigm in the international legal regime governing the use of force. His analysis concluded that 9/11 marked a turning point in international law and relations due to the status of the attacks as acts of war,

not criminal behaviour. This book examined both sides of the arguments surrounding the legality of the interventions in both Afghanistan and Iraq by extensive use of many different scholars' research. In addition, Maogoto not only presented the Bush II administration's theory that the U.S. invasion of Iraq was lawful due to the international legal doctrine of anticipatory self-defence, but then asked the next question which is: how will anticipatory self-defence affect the international community if other states use it, as the U.S. used it, to justify unilateral military action? With the possibility of terrorists' obtaining WMD, Maogoto warned that a broad right of anticipatory self-defence would "introduce dangerous uncertainties relating to the determination of potential threats justifying pre-emptive action." (Maogoto, 2005: 137)

The legality, under international law, of the use of force in Afghanistan and Iraq was explored in detail in *Necessity, Proportionality and the Use of Force by States* by Judith Gardam. Her research complemented the analysis in Maogoto and Gray but went further regarding the requirements of proportionality and necessity in self-defence. Gardam examined the use of force in Afghanistan after 9/11 and noted that the Taliban's harbouring of members of al Qaeda was regarded by the international community as "sufficient to justify a military operation against that state of unprecedented magnitude that led to the deposing of the government." (Gardam, 2004: 145) Both Maogoto and Gardam discussed the possibility of the U.S, by pushing the doctrine of self-defence to justify uses of force against terrorists, may loosen the restraints on states resorting to force in place since the enactment of the UN Charter.

In addition to these books, there are numerous articles published on the international legal system and the problem of combating terrorism. For example, the July and October 2003 issues of the *American Journal of International Law* contained a forum on the future implications of the Iraq conflict; several international legal scholars participated and contributed articles that supported the Bush Administration's actions while other authors condemned them as violations of the UN Charter. Two of the most informative articles from the *American Journal of International Law* July forum, representing different ends of the debate on the legality of the Iraq invasion, are discussed below. The first article is by William H. Taft IV and Todd F. Buchwald entitled "Preemption, Iraq, and International Law." Taft and Buchwald, formerly the Legal Adviser and the Assistant Legal Adviser for Political-Military Affairs of the U.S. Department of State, put forth a justification of the U.S. led invasion of Iraq in 2003 as a continuation of collective self-defence arising from Iraq's 1990 invasion of Kuwait and Iraq's breaches of Security Council resolutions. As former members of the Bush II administration, the authors were, unsurprisingly, vague, doctrinaire, and dogmatic in their analysis. For example, they simply wrote, "Operation Iraqi Freedom was and is lawful" and avoided going into the messy details which may have contradicted their conclusion. However, this article would have been better if the authors had attempted a more critical appraisal of the Bush administration's military operation in 2003. Nevertheless, the article was quite useful because it is one of the few early statements published by officials from the U.S. government discussing the legality of the war in Iraq and the doctrine of preemption.

The second article from the *American Journal of International Law's* forum on the Iraq conflict was Miriam Sapiro's "Iraq: the Shifting Sands of Preemptive Self-Defense." This article examined the Bush administration's doctrine of pre-emptive war in detail and concluded that it represented a significant departure from traditional conceptions of anticipatory self-defence under international law since the creation of the UN Charter in 1945. Although the Bush administration called its approach "preemptive," Sapiro argued it is more accurate to describe it as "preventive" because instead of preempting a specific, imminent threat, the objective of this approach was to "prevent more generalized threats from materializing." Sapiro's article analyzed the Bush administration's military campaign in Iraq in 2003 from an international law perspective without discussions about the domestic politics behind President Bush's decision to go to war in 2003 against Saddam Hussein's regime in Iraq. Sapiro insightfully pointed out the many risks inherent in allowing any state to adopt a doctrine of preventive war and counselled the United States to "find opportunities to narrow the scope" of this doctrine in the future, lest other countries adopt and use it to justify other military actions.

In the journal *Parameters,* Jeffrey Record, a professor at the U.S. War College, explored the "Bush Doctrine" and the war in Iraq. This was a controversial piece when it was written because Record bluntly questioned the usefulness of the Bush Doctrine in combating international terrorism. The U.S. army was quick to note that the views expressed in the article are Record's and not official U.S. policy. Record examined the Bush doctrine via five observations: 1) "The threat of WMD proliferated among suicidal or otherwise undeterrable terrorist groups is new, real, and potentially

catastrophic, but the Bush Administration's primary focus on regime change in Iraq may be a focus on the periphery rather than the heart of the threat; 2) The Bush Doctrine correctly dismisses the effectiveness of deterrence against suicidal terrorist organizations, but it may be mistaken in dismissing its effectiveness against rogue states; 3) the Bush Doctrine rightly focuses on the principle of regime change as the most effective means of defeating threats posed by rogue and terrorist-hosting weak states, but actual regime change can entail considerable, even unacceptable, military and political risk, depending upon local, regional, and international circumstances; 4) In transforming an implicit policy option---striking first---into a declaratory doctrine, the Bush Administration has reinforced an image of America, widely held among friends and adversaries alike, of a unilateralist, overbearing "hyperpower" insensitive to the concerns of others; 5) The Bush Doctrine invites abuse and establishes a dangerous precedent for others to follow." (Record, 2003: 11) This article was extremely helpful in guiding the early research because its analysis of the preceding points was clear and Record applied the theories of containment and deterrence to terrorist organizations.

Other journals which published relevant articles on international law after 9/11 are the *European Journal of International Law* and the *International and Comparative Law Quarterly.* An example of a non-American legal journal is the *Tilburg Foreign Law Review,* which published an article by Carsten Stahn called "Collective Security and Self-Defence after the September 11 Attacks." This well-organized and thoughtful piece examined the lawfulness of the U.S. led military action against the Taliban regime in Afghanistan after 9/11. Stahn discussed the ambiguities of the law of self-defence under the

UN Charter and the system of collective security originally designed by the UN drafters after World War II. Although it was written before the U.S. led invasion of Iraq in March 2003, the analysis contained in it remains relevant because it systematically examined the law of self-defence, which was transforming in the wake of U.S. actions to pursue terrorists. Stahn suggested five standards or tests that must be met before state action against terrorist groups would be considered lawful under the UN Charter. These are the following: the terrorist act must be of "substantial gravity" to qualify as an "armed attack" under article 51 of the UN Charter; the act must be imputable to the state against which force is used; self-defence is lawful only after the exhaustion of peaceful remedies; acts of self-defence against terrorist activities must be carefully targeted; and finally, the use of force must be proportional.

The preceding books and journal articles examine the legal issues surrounding the use of force from an international perspective but, as noted in the introduction to this section, there is another aspect to the law and this is the domestic legality of actions taken by the President. In this area, the analysis begins with the U.S. Constitution, which was written well before worries about non-state actors aspiring to WMD acquisition. In fact, the U.S. Constitution was adopted in 1787, a few years before the Reign of Terror in France gave the English language the word "terrorism" (its original usage referred to state terror). The last section in the literature review surveys the literature describing and analyzing the powers of the modern President regarding the use of force. Although there is a great deal of work done on the topic of how decisions are made concerning committing military forces to

combat, there is far less on the issue of using force in counterterrorism, and even less on what constrains these decisions. The American system of government, according to the Constitution, splits authority to make foreign policy between the legislative and executive branches. The executive is the Commander-in-Chief and is responsible for implementing policy, while the legislative branch has the power to declare war, regulate commerce with foreign countries, and appropriate the funds for the military.

In theory, the concept of separation of powers and the doctrine of checks and balances in this system would ensure the two branches shared authority to make foreign policy. However, since the end of World War II, for a variety of reasons including the advent of nuclear weapons and the status of the U.S. as the lone superpower, the executive branch has exercised more power over the direction of U.S. foreign policy, particularly national security policy. My research, while not directly evaluating the wisdom of this evolution, touches upon it because, as the chapters on the four administrations illustrate, decisions regarding the use of force in counterterrorism are made in the executive branch. Conventional wisdom on using force for counterterrorism dictates that the legislative branch, lacking the information available to the executive and unable to maintain secrecy (it is a common cliché that there are simply too many Senators and Congressmen to keep a secret) and to make decisions quickly, should have a minor role. Under the Bush II administration, there was less Congressional oversight of these decisions. As described by Bruce Fein, an attorney in the Reagan administration, the fear is that future administrations will continue this trend with the loss of democratic accountability and the legitimacy that accompanies decisions made in

accordance with the original constitutional design. Fein wrote several books on this subject, frequently appeared before Congress to give testimony, and agreed to be interviewed for this research.

Broadly speaking, there are two schools of thought regarding the proper allocation of powers regarding foreign affairs under the U.S. Constitution. The first school, which supports the executive branch asserting itself and dominating the foreign policy process, is represented by books and articles detailing the executive's superior knowledge regarding foreign affairs and ability to implement policy. An example is the 1979 book by Thomas Franck and Edward Weisband entitled *Foreign Policy by Congress*, which explored the post-Watergate reforms enacted by an "insurgent" Congress challenging the executive for control over foreign relations. Franck and Weisband pointed to the War Powers Resolution of 1973 as evidence, among other reforms, that Congress was determined to wrestle control over foreign policy from the executive branch. Another oft-cited example is *The Unitary Executive* (2008) by Steven Calabresi and Christopher Yoo. The authors of this book argued that American history established a "strong, internal, executive branch precedent" of the principle of the unitary executive. (Calabresi and Yoo, 2008: 9) Other scholars and advocates of presidential power have extrapolated from this principle many things, including a more robust version of the unitary executive theory, which was used by lawyers in the Reagan administration and later, by the second Bush administration. They promoted the doctrine that the Framers of the U.S. Constitution intended to give the president independent authority, unchecked by the other branches of government, to determine the meaning and scope of certain laws. The far-

reaching implications of this doctrine, applied to foreign policy formulation, are detailed in the Reagan chapter and the Bush II chapters.

The other school of thought, called the "pro-congressional" school, is represented by scholars such as David Gray Adler, Larry George, Harold Koh, and Louis Fisher. Their numerous articles, books, and testimony at congressional hearings tend to start with the history of the drafting of the U.S. Constitution, with special emphasis placed on the Framers' intent to avoid a monarchical form of power distribution which allowed the monarch to have sole discretion over matters of foreign policy. Koh's discussion of a "national security constitution" in his book, *The National Security Constitution: Sharing Power after the Iran-Contra Affair*, forms the backbone of the next chapter. David Adler and Larry George edited *The Constitution and the Conduct of American Foreign Policy*, which is a collection of essays discussing the nature of the separate but shared foreign policy powers held by the legislative and executive branches. Adler and George argued that a "myth" emerged post-World War II which permits the president to do "whatever he wishes" in foreign affairs and this myth is "corruptive of political democracy, and counterproductive to the nation's interests here and abroad." (Adler and George, 1996: 1) They faulted both Republican and Democratic presidents and the judiciary in the U.S. for allowing this evolution to occur. Fisher, a specialist in separation of powers issues, followed their analysis with his observations regarding the causes of presidential dominance in foreign policy-making, despite the evidence that the Framers intended a system of shared powers, not an absolute monarch with royal powers over war and peace.

Fisher wrote numerous articles and books analyzing various aspects of executive and legislative powers including *Presidential War Power, In the Name of National Security: Unchecked Power and the Reynolds Case,* and *The Constitution and 9/11: Recurring Threats to America's Freedoms*. According to Fisher, the Framers saw the need for the executive branch to "repel sudden attacks," but since World War II, Presidents have usurped powers and claimed the right to send American troops into hostilities anywhere in the world. The results have been unpopular military interventions such as Vietnam and unauthorized executive branch covert actions like the Iran-Contra scandal, which is discussed further in the Reagan chapter. In *Constitutional Conflicts Between Congress and the President*, Fisher assessed the circumstances of the second Bush administration during which the Congress took a "backseat" regarding decision-making in foreign affairs, leaving President Bush to "fill the vacuum." (Fisher, 2007: 284-285) Fisher, formerly at the Congressional Research Service of the Library of Congress, agreed to be interviewed as part of my research and his analysis appears throughout the thesis.

Arthur Schlesinger wrote about the dangers of an unaccountable executive in the 20th century in *The Imperial Presidency*, written shortly after the shocks of President Nixon and the Vietnam War. Schlesinger explored the abuses of power and the threats posed by presidential resorts to emergency prerogatives and in 2004; he was motivated by the second Bush administration to write a new introduction to the latest edition. Two books which built upon Schlesinger's ideas and applied them more explicitly to the presidency of George W. Bush are *The Dark Side: the Inside Story of How the*

War on Terror turned into a War on American Ideals by Jane Mayer and *Takeover: the Return of the Imperial Presidency and the Subversion of American Democracy* by Charlie Savage. Savage's book won the Pulitzer Prize in 2007. Intended more for a general audience, both books were extensively footnoted and detailed regarding activities in the Bush II administration. In addition, the books documented how the Bush II administration borrowed ideas and practices from previous administrations, particularly Reagan's, to enlarge the powers of the executive branch. These included the practice of adding "signing statements" to laws to evade the intent of Congress and other executive branch initiatives designed to increase the powers of the President while avoiding oversight by either the courts or Congress. The results, as described in chapters 7 and 8 of this thesis, were frequently at odds with stated American policies regarding the treatment of detainees and long-standing practices regarding surveillance. Moreover, the path taken by the Bush II administration presents a problem concerning the possibility of catastrophic terrorism in the future: how would a future administration act if a nuclear, biological, or chemical weapon caused major damage in the U.S?

At its core, this research seeks to find and examine the legal mechanisms that constrain the U.S. president when formulating use of force decisions in counterterrorism. The practical constraints regarding counterterrorism, such as lack of actionable intelligence, the difficulty of projecting force outside U.S. borders, obtaining cooperation from foreign states, and other constraining factors are discussed in the context of the four administrations. Nevertheless, the focus remains on what legal and political

factors control presidential decision-making in this area, given the nature of the international legal regime on the use of force and domestic disputes over the powers of the executive branch to control all aspects of national security policy. The experience of the past four administrations, especially that of the second Bush administration, indicates there are few real constraints on this exercise of power. With the advent of technologies like remotely-operated drones, and the possibility of terrorists obtaining WMD, the questions surrounding constraints on the U.S. executive are ever more compelling and important.

Chapter 3
Principles Allocating Foreign Affairs Powers

The executive branch in the U.S. system of government must confront two related questions when considering using force in counterterrorism: does international law permit the proposed use of force (essentially, an *international* law question)? In the first chapter, the international legal norms regulating the use of force were detailed in the discussion on Articles 2(4) and 51 of the UN Charter. This chapter examines the second question: does the president have the authority under the U.S. Constitution to use force (the question of *domestic* legality)? This inquiry focuses on domestic legal constraints on the president when decisions to use force are made. The chapters on the Reagan, Bush I, Clinton, and Bush II administrations will then enumerate how each administration viewed the analysis required by the international law question and the domestic legality question.

A discussion of the President's authority to use force should begin with the system of checks and balances famously devised by the Framers of the U.S. Constitution to keep each branch of government under control. The Framers, wary of royal prerogatives and cognizant of the high costs of European wars, intended to create a republic with three co-equal branches, the legislature, executive, and judiciary. The theory for the government they created was based on a separation of powers, with one branch of government limiting another branch. At least on paper, Congress' war-making powers are as great as the President's because, according to Article 1, section 8 of the Constitution, Congress has the following war powers:

- To declare war, grant letters of marquee and reprisal, and make rules concerning capture on land and water
- To lay and collect taxes. . . to. . . provide for the common defence
- To define and punish . . . offenses against the law of nations (international law)
- To raise and support armies
- To provide and maintain a navy
- To make rules for the government and regulation of the land and naval forces
- To provide for calling forth the militia to execute the laws of the union, suppress insurrection and repel invasions
- To provide for organizing, arming, and disciplining, the militia

In addition, Congress controls the appropriations process to fund wars and may pass laws which are "necessary and proper" to fulfil its duties.

In contrast, the President has fewer war-making powers on paper. As one American legal scholar wrote, "If law were math, we might add up the clauses and declare Congress the winner." (Baker, 2007: 178) According to Article II of the Constitution, the President is Commander-in-Chief of the army and navy and is obligated to "take care that the laws be faithfully executed." The reality is that war-making powers, like other powers, are separate but often shared and the executive branch has more power than a casual reading of the text of the Constitution would indicate. One constitutional law expert explained the situation as an "invitation for Congress and the President to

struggle for the privilege of directing American foreign policy." (Koh, 1990: 156) Presidential power, which is based on unspecific, but significant inherent powers in constitutional text, tends to expand "when factors such as national crisis, military action, or other matters of expedience call for its exercise." (Marshall, 2008: 510)

The U.S. has declared "war" pursuant to Congress passing a declaration eleven times since its founding; the last time was during World War II. The modern trend is for the President to ask Congress for its "support" (but not necessarily permission) through an authorization for the use of force. As detailed in subsequent chapters, President George W. Bush claimed inherent war powers as part of his role as Commander-in-Chief and maintained that congressional authorization, although welcome, was not required. His father, the first President Bush, took a similar position before the first Gulf War in 1991. Therefore, in practice, the text of the Constitution alone does not resolve how conflicts regarding decisions to use force are made in the 21st century.

Koh's National Security Constitution

Harold Koh, currently the legal advisor to the Department of State in the Obama administration, analyzed the disparity between the few war-making powers granted to the President and the many granted to Congress with contemporary foreign-policy making practice in a ground-breaking book written in 1990. In *The National Security Constitution: Sharing Power after the Iran-Contra Affair*, Koh, formerly the Dean of Yale Law School, not only

examined the Iran-Contra scandal, but also charted the decline of the American system of checks and balances in foreign affairs. The major premise of the book----that fundamental defects exist in the structure of the American national security decision-making process----has been debated and discussed by political scientists and constitutional law scholars ever since its publication. *The National Security Constitution* is frequently cited in academic works both supporting and opposing unilateral presidential exercises of the use of force and this research, based upon its theoretical foundations, analyzed the four administrations and their uses of force in counterterrorism with these foundations as a guide.

In essence, Koh argued that a "normative vision of the foreign-policy-making process," labelled the "national security constitution" emerges partially from the text of the Constitution. (Koh, 1990: 68) In addition to the text of the Constitution, the other sources for the national security constitution include judicial decisions that construe the Constitution, framework statutes enacted by Congress, framework executive orders issued by presidents, and historical precedents involving foreign relations that Koh termed "quasi-constitutional custom." According to Koh, these sources formed a hierarchy with the text of the Constitution at the top, as the highest source for the national security constitution. Next are the relatively few judicial decisions issued by the U.S. Supreme Court which interpret the powers allocated to the three branches of government regarding foreign relations; two of the most important cases, *Youngstown* and *Curtiss-Wright*, are mentioned later in this chapter.

Framework statutes and framework executive orders occupy the second level of the hierarchy. Framework statutes "specify legal authorities and constraints for particular institutional acts; they provide procedures to evaluate and control particular exercises of delegated powers; and they foster institutional expectations as to how those powers will be exercised in the future." (Koh, 1990: 70) For the purposes of this thesis, the framework statutes most relevant to the use of force in counterterrorism are the National Security Act of 1947 and the War Powers Resolution of 1973, discussed in subsequent sections.

Quasi-constitutional custom stands at the lowest level of Koh's hierarchy for the national security constitution; it is analogous to customary international law in that it evolves from actual practice. Instances of quasi-constitutional custom are executive branch practices in foreign affairs or, more specifically, counterterrorism that Congress approves of, or acquiesces to, and formal or informal congressional actions with which the president has repeatedly complied. Like customary international law, which may be amended by treaties, quasi-constitutional custom may be altered by a subsequent statute passed by Congress and signed into law by the president. Although quasi-constitutional custom appears at the lowest level of Koh's hierarchy, making its significance opaque, it is quite germane to the use of force in counterterrorism because many of the activities the Bush II administration undertook during its "war on terror" were based on previous presidential practices. As detailed in later chapters, the second Bush administration frequently justified its assertions of executive power by reference to precedents established by other presidents, such as Reagan's

bombing of Libya in 1986 to deter Libyan terrorism. Moreover, the Bush II administration was "in the business of creating executive power precedents," which means that future presidents may build upon those historical precedents to expand their powers. (Savage, 2011)

Koh used his analysis of the national security constitution to support his contention that the whole area of foreign policy-making, including war powers, was based upon the principle of "balanced institutional participation," meaning that all three branches of government had roles in foreign relations. (Koh, 1990: 72) Most foreign relations decisions fall into the sphere of concurrent authority, which the president manages, subject to checks provided by congressional consultation and judicial review. The system designed by the Framers depends upon balanced participation by all three branches of government, but since U.S. involvement in Vietnam, the system has been dominated by the executive branch. Koh used the Iran-Contra affair to illustrate his broader point that unless all three branches of government participated in the process of foreign policy making, more executive branch mistakes like Iran-Contra were inevitable. For Koh, the Iran-Contra affair was a symptom of the failures of the foreign policy process, not an aberration stemming from overzealous executive branch officials.

The Pattern of Foreign Policy Making: Executive Initiative

An important element of Koh's theory about the national security constitution is the pattern of executive initiative, congressional acquiescence, and judicial tolerance regarding the contemporary process of foreign policy in

the U.S. This section explains the pattern, how it relates to the topic of this thesis, and suggests how the analytical method will be applied to the four administrations in the study in subsequent chapters. Executive initiative refers to the tendency of modern American presidents to initiate action in foreign relations due to the nature of the office, i.e. the president is elected nationally and expected to take the lead regarding foreign affairs. Unlike Congress, which is bicameral and composed of many individual members with various constituencies, the president is well-situated to drive the process of foreign policy making. He controls the various intelligence agencies and thus, possesses superior knowledge about foreign relations and the Constitution makes him Commander-in-Chief of the military. In addition, the President, unlike Congress, may act quickly in response to a crisis and, after the crisis, he speaks with one voice in articulating the policy justifications to the general public. As one former executive branch staffer put it, "unilateral executive action has advantages in surprise, speed, and secrecy." (Baker, 2007: 25)

There are several theories that executive branch officials rely upon to justify uses of force without explicit congressional authorization. For instance, one way to justify the use of force is to distinguish between offensive and defensive resorts to force. If the President is using force defensively to protect the country, instead of offensively, then the President may unilaterally use force without prior congressional authorization. (Baker, 2007: 179) Of course, according to this school of thought, an offensive use of force would still require authorization from Congress. Another theory is that, while only Congress may "declare" war according to the Constitution, uses of force short of a "war" may be authorized by the President alone; several Presidents utilized this theory to

argue that they did not need a formal declaration of war prior to initiating hostilities. According to Louis Fisher, one of the interviewees, a thorough review of the history of the drafting of the Constitution reveals that the President's unilateral ability to use force is limited to the narrow circumstances of imminent danger to American lives, or an actual attack on the U.S. For Fisher, the Framers of the Constitution "gave Congress the power to initiate war" because they feared entrusting the executive branch with such an important decision. (Fisher, 2004: 10) The Framers' expectation was that requiring Congress to declare war would impede any rush to war advocated by the executive branch for its own purposes.

The War Powers Resolution

When the President takes the initiative in foreign relations, he "has often done so by construing laws designed to constrain his actions as authorizations." (Koh, 1990: 117) The best example of this is the War Powers Resolution (WPR), which became law in 1973 despite President Richard Nixon's veto. The WPR grew out of public and congressional discontent with the conduct of the executive branch in Vietnam and Cambodia, where President Nixon secretly ordered aerial bombing without disclosing the use of force to the public or Congress. Vietnam was the result of incremental increases in the number of troops in Southeast Asia, under the authorization of the Gulf of Tonkin Resolution in 1964. Ely noted that Congress did authorize the Vietnam War, but it was done "backhandedly," enabling Congress to avoid "serious consideration of the consequences of its actions." (Ely, 1993: 47) Although the WPR was intended to constrain the executive

branch and re-establish congressional control over war powers decisions, in practice it has not worked as intended. Some critics contend it gives the executive branch too much discretion to use military force without meaningful input from Congress, while others maintain that it impinges upon the President's powers as Commander-in-Chief. A brief review of its provisions is necessary because, according to U.S law, the President must have legal authority to use force. In theory, the WPR could be a constraint on the executive's use of force against international terrorism, but an evaluation of the four administrations reveals it is more of an equivocal constraint.

The stated purpose of the WPR is "to fulfill the intent of the Framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of U.S. armed forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." (WPR resolution, see Fisher, p. 290) The WPR explicitly requires both *consultation* and *reporting*; section 3 requires that the President "in every possible instance shall consult with Congress before" introducing troops into hostilities. The "consultation" with Congress regarding the use of force as counterterrorism has become a pro forma notification in which the President informs a limited number of members of Congress shortly before the incident. This was the pattern in Libya in 1986 (Reagan administration) and in the 1998 missile strikes in Afghanistan and Sudan (Clinton administration). If the legislature intended the consultation requirement to be a real check on executive branch uses of force, the experience of the four administrations indicates the consultation is neither

a meaningful exchange of views, nor a timely check on executive branch action.

The second condition of the WPR, *reporting*, requires the President to report to Congress within forty-eight hours after introducing U.S troops into "hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." A report submitted according to section 4 of the WPR triggers the "sixty-day clock" which means the "President shall terminate any use of U.S. Armed Forces" unless Congress has declared war, or enacted specific authorization, or granted the President an extension. On paper, this might appear to constrain the executive branch but, in practice, the executive branch does not indicate under what section of the WPR a report is filed, and thus avoids the problem of the sixty-day clock. In fact, only President Ford has cited section 4 of the WPR in a report, and that occurred in 1975 when the U.S. used force to rescue the crew of the U.S. merchant ship *Mayaquez*. (Fisher, 2004: 156) In this manner, the executive branch avoids potential problems with the sixty-day time limit on troop deployments.

Since it was enacted in 1973, every "President has taken the position that it is an unconstitutional infringement by the Congress on the President's authority as Commander-in-Chief." (Grimmett, 2012: 1-2) However, the executive branch still writes Congress a report "consistent" with, but not "pursuant" to, the WPR, indicating the President and his advisors do not feel legally obligated by the law to report the introduction of troops into hostilities. (Baker, 2007: 184) According to Baker, a former legal advisor to the National Security Council, the majority of WPR reports to the Congress are

"inconsequential and ministerial, even pro forma." (Ibid) During the second Bush administration, when Special Forces teams were deployed globally to hunt members of al Qaeda, the WPR reports for Congress adopted "broad generalizations that avoid secrecy concerns" and afforded President Bush "maximum flexibility." (Baker, 2007: 185) During the course of his two terms, President George W. Bush submitted 39 WPR reports to Congress.

The Congressional Research Service identified three problems with the WPR. The first is the disputed nature of the word "hostilities" for purposes of triggering consultation between the President and Congress. The second concerns the definition of "consultation" and the propensity of the executive branch to interpret that as merely *informing* Congress shortly before the use of military force. The third problem is who represents Congress for the required consultation: a few senior members, or should it encompass the entire Congress? (Grimmett, 2012: 22) It is beyond the scope of this research to evaluate whether the WPR would prevent another creeping military intervention such as Vietnam. Clearly, when the WPR was passed in 1973, the U.S was not threatened by transnational non-state terrorists and so Congress did not contemplate this type of national security threat in the statute. For the purposes of the current topic, the use of force in counterterrorism, the evidence of the four administrations reveals the requirements of the WPR were not a constraint on executive branch freedom of action.

Applying the concept of executive initiative to the area of counterterrorism, the use of drones for discreet military operations illustrates

Koh's point. Drones, unmanned aerial vehicles, were first used by the Clinton administration for intelligence purposes. Various accounts detail the evolution of drones from intelligence-gathering capabilities to lethal weapons. (Coll, 2004, O'Connell, 2010, and Gellman, 2002) Cofer Black at the CIA advocated arming them at the end of the Clinton administration to fly missions against al Qaeda in Afghanistan, but "State Department lawyers objected, arguing that an armed drone might violate the Intermediate Nuclear Forces Treaty, which banned the United States from acquiring new long-range cruise missiles." (Coll, 2004: 531) After the 9/11 attacks, the American public expected the executive branch to take strong action against terrorists and the Bush II administration began using drones equipped with missiles against suspected terrorists in the autumn of 2001. Congress did not vote on the decision to arm drones for military strikes. Instead, the Bush II administration calculated that using them was lawful because the Congress had appropriated the funds for drones and passed a broadly worded Authorization for Use of Military Force against those involved in the 9/11 attacks. As explored in the chapter on the second Bush administration, the executive branch relied on the Authorization for Use of Military Force for many of its more controversial practices during the "war on terror."

Moreover, using armed drones in brief, discreet military operations avoids potential conflict with the WPR because no ground troops are involved and the use of force is executed quickly. Congress and the general public typically find out about the drone strike after it is over. As the author of *The Costs of Counterterrorism*, Laura Donohue, explained during an interview with the author, the government avoids WPR questions and possible complications

by using drones. She added that reliance on drones for counterterrorist operations is an additional problem for a democracy in that the legal authority permitting drones remains secret so it is very difficult to check the government in this area. Due to the fact that "national security" becomes a "trump card" for the President, he usually gets what it he wants in terms of authority in counterterrorism laws. (Donohue Interview)

The National Security Act

The second framework statute which is important regarding the composition of the National Security Constitution is the National Security Act (NSA) of 1947. President Truman signed the act which merged the Department of War with the Department of the Navy; this entity was eventually renamed the Department of Defense (DoD). The NSA also established the Central Intelligence Agency (CIA) and the National Security Council (NSC). Both of these organizations will be described briefly as they have roles in the executive branch's use of force in counterterrorism. The CIA is responsible for collecting, evaluating, disseminating, and advising on intelligence about foreign governments, corporation, and individuals. Congress also gave the CIA the authority "to perform such other functions and duties related to intelligence affecting the national security as the NSC may from time to time direct." (National Security Act, 1947) This language seems to authorize covert operations in support of NSC policies. During the Cold War, the CIA spent a great deal of time monitoring the movements of the Soviet Union and its satellites. In 1986, during the Reagan administration, the CIA established a Counterterrorist Center in response to the increase in terrorist attacks against

Americans and American interests. During the Clinton administration, in 1996, the CIA set up the Bin Laden Unit within the Counterterrorist Center to track bin Laden and his associates.

The NSA also established the National Security Council, which is formally part of the executive branch; its functions include advising and assisting the President on matters of national security and foreign policy. In addition, the National Security Council coordinates policy with meetings chaired by the President who appoints a National Security Advisor as part of his team. Other members of the National Security Council are the Vice President, Secretary of State, Secretary of the Treasury, and Secretary of Defense. Others may attend meetings, such as the Attorney General, depending on the topic under discussion. The National Security Advisor is not subject to confirmation by the Senate, so the President is free to appoint a trusted confidant without worrying about Senate confirmation. Over the years and particularly since President Kennedy appointed McGeorge Bundy, the position of National Security Advisor has grown in importance. The chart below lists the National Security Advisors in the four administrations in this research; Republican administrations are in red, while the Democrats are in blue. To varying degrees, these National Security Advisors served their Presidents by managing "the process of making decisions on major foreign and national security issues" and by overseeing the "implementation of the decisions the President has made." (Daalder & Destler, 2009: 128) Further details on the National Security Advisors are found in the Reagan, Bush I, Clinton, and Bush II chapters.

President	National Security Advisor	Time in Office
Ronald Reagan	Richard Allan	Jan. 1981- Jan. 1982
	William Clark	Jan. 1982- Oct. 1983
	Robert McFarlane	Oct. 1983- Dec. 1985
	John Poindexter	Dec. 1985- Nov. 1986
	Frank Carlucci	Dec. 1986- Nov. 1987
	Colin Powell	Nov. 1987- Jan. 1989
George H.W. Bush	Brent Scowcroft	Jan. 1989- Jan. 1993
Bill Clinton	Anthony Lake	Jan. 1993- March 1997
	Sandy Berger	March 1997- Jan. 2001
George W. Bush	Condoleezza Rice	Jan. 2001- Jan. 2005
	Stephen Hadley	Jan. 2005- Jan. 2009

The NSA is also an important statute regarding the collection of intelligence. As Baker wrote, "intelligence is the fuel of counterterrorism," while the "presidency is the engine of counterterrorism." (Baker, 2007: 126) Without actionable intelligence, the executive is unable to authorize any use of force in counterterrorism. The NSA requires the executive branch to give the intelligence committees in Congress briefings on the intelligence collected by the government so that Congress may perform oversight. However, the

"executive branch exploited the statute's ambiguity to the hilt" by providing bare bones briefings to the "gang of eight," which includes the chairs and ranking minority members of both the House and Senate intelligence committees, along with the House and Senate majority and minority leaders. (Schwarz and Huq, 2007: 140) Unless Congress performs meaningful oversight of the executive branch, abuses of power are inevitable.

A great deal of academic literature on the NSA attempts to chart its influence on U.S. foreign policy making and evaluate whether the NSA needs to be modernized, given that it was enacted in 1947, in response to the threat from the Soviet Union. One author, for example, traces how the wartime emergency of World War II became the Cold War and how that morphed into a "war on terror" after 9/11. His thesis is that the atomic bomb fostered an era of continuing crisis, increased the power of the presidency, and redefined the U.S. government as a "national security state." (Wills, 2010) Other authors described how the environment of continuing crisis after the 9/11 attacks assisted in expanding executive powers in the second Bush administration. (Mayer, 2009 and Savage, 2007) The NSA and NSC will be mentioned in the following chapters as they pertain to the use of force in counterterrorism without addressing broader questions about the compatibility of the intelligence gathering capabilities of the CIA and other executive branch agencies with notions of democratic accountability. The next section addresses part two of Koh's pattern, congressional acquiescence.

Congressional Acquiescence

The second part of Koh's pattern regarding national security is congressional acquiescence, which goes to the heart of the research question about the role of Congress in shaping use of force decisions. After studying the history of foreign policy making since Vietnam, Koh noted that the President "almost always seems to win in foreign affairs." (Koh, 1990: 117) Despite its powers in the Constitution, Congress usually "acquiesced in what the president has done, through legislative myopia, inadequate drafting, ineffective legislative tools, or sheer lack of political will." (Ibid) Several of the interviews with former members of the executive branch explored this phenomenon for the thesis. The consensus from the interviewees was that congressional oversight is typically lax when the President's political party controls both houses of Congress. In theory, the Framers of the Constitution expected Congress to check the executive branch as a matter of institutional loyalty and pride; the Framers did not account for the growth of political parties in the American system. Moreover, when the same political party controls both the Congress and the executive branch, the President is the party leader in the legislature.

Koh cites the WPR as an example of inadequate drafting; as discussed above, the WPR has failed to constrain the executive branch regarding the introduction of armed forces into hostilities. This is partially the result of political compromises necessary to first pass the statute and then override President Nixon's veto. Political compromises among members of Congress are essential in the legislative branch. In fact, the strengths of the legislative branch, compromise, democratic debate, and bargaining, are often

seen as detriments to swift decision-making in the realm of foreign affairs. In addition, few Congressmen or Senators are elected based on their abilities in foreign relations; constituents tend to focus on domestic problems, until there is a foreign policy crisis.

One of the most important devices Congress possesses for controlling the executive branch is the "power of the purse," the ability of Congress to control appropriations for foreign relations and other matters. According to Baker, "it is the exercise of the appropriations power that can guarantee meaningful congressional participation in the national security process if it is used effectively." (Baker, 2007: 102) Fisher writes that the Framers granted the power of the purse to Congress while making the President the Commander-in-Chief to "separate the purse and the sword." (Fisher, 2004: 11 and Fisher Interview) However, much has changed since the Constitution was adopted in 1787 including the maintenance of a standing army, the emergence of the U.S. as a superpower, and the speed and lethality of modern weapons. The frequently made argument, that Congress could control the President's war making or other uses of force by cutting off the funding, underestimates the dilemma facing Congress. After troops are deployed, it is actually quite difficult politically for Congress to cut off funding the troops in the battlefield. Once the President has deployed troops, there is typically a "rally round the flag" attitude, which encourages Congress and the general public to back the use of force, at least until the troops appear caught in a quagmire.

In addition to the "power of the purse," Congress has the ability to investigate executive branch malfeasance by holding oversight hearings. Over the years, oversight committees have occasionally curbed abuses and produced meaningful reforms; the committees chaired by Senator Frank Church and Congressman Otis Pike in the 1970's led to real reform of the intelligence-gathering of the CIA, FBI, and NSA. (Schwarz and Huq, 2007: 50) In theory, congressional oversight might function to curtail executive branch initiatives in national security, but an evaluation of the four administrations reveals that congressional oversight is often minimal due to the lack of political will to hold hearings and question the executive branch. Indeed, as a legal commentator noted, "oversight of security agencies by Congress itself has been weak to nonexistent, with the exception of moments such as the Church Committee and the 9/11 Commission." (Huq, 2007: 48) Compounding the problem is the number of committees that are tasked with overseeing elements of the national security apparatus. For example, one chart documenting congressional oversight in the 110th Congress displays 108 committees and subcommittees charged with overseeing the Department of Homeland Security. In 2011, two investigative reporters documented the enormous growth of government agencies with "top secret" employees at over 1,300 facilities in all 50 states that constitute part of the government's counterterrorism operation post 9/11. (Priest and Arkin, 2011) The sheer volume of agencies tasked with national security makes effective oversight an oxymoron.

Another important dimension to congressional acquiescence is a lack of political will to challenge the executive initiative in foreign relations; this is

particularly evident when the President and the majority in Congress are in the same political party. The issue of political will surfaced several times in interviews when discussing the Bush II administration and the use of force. For instance, Bruce Fein, a Justice Department attorney in the Reagan administration, was extremely critical of the lack of political will in Congress vis-à-vis the Bush II administration. Expanding on the notion of Congress as an inkblot, he wrote, "By elevating party loyalty above institutional prerogatives, Congress has voluntarily reduced itself to an inkblot on the political landscape." (Fein, 2010: 27 and Fein Interview) Likewise, Lawrence Wilkerson, former chief of staff to Colin Powell, remarked that there was a lack of congressional oversight concerning the "war on terror" due to the "lack of moral courage" to challenge the Bush White House and because the "complexity of governance" meant members of Congress do not have the same level of expertise as those in the executive branch. (Wilkerson Interview)

A related element in congressional acquiescence is the extremely polarized two-party system that currently prevails in the U.S. Individual members of Congress calculate that their political success depends more on how their political party is faring with the electorate than on how well Congress performs its collective duty as a check on presidential power. Members of Congress then "have a greater personal interest in the President's success as leader of their party than they have in Congress as an institution." (Marshall, 2008: 518-519) President George W. Bush benefitted from having a Republican controlled Congress for most of his presidency and executive

branch excesses in the “war on terror” went unchecked by Congress. (Green, 2007: 52)

Session	Years	President’s Party	Congress	House FRA	Senate FRC
97	Jan. 1981-1982			Zablocki-D	Percy-R
98	Jan. 1983-1984			Zablocki/Fascell-D	Percy-R
99	Jan. 1985-1986			Fascell-D	Lugar-R
100	Jan. 1987-1988			Fascell-D	Pell-D
101	Jan. 1989-1990			Fascell-D	Pell-D
102	Jan. 1991-1992			Fascell-D	Pell-D
103	Jan. 1993-1994			Hamilton-D	Pell -D
104	Jan. 1995-1996			Gilman-R	Helms-R
105	Jan. 1997-1998			Gilman-R	Helms-R
106	Jan. 1999-2000			Gilman-R	Helms-R
107	Jan. 2001-June 2001			Hyde-R	Helms-R
107	June 2001-2002			Hyde-R	Biden-D
108	Jan. 2003-2004			Hyde-R	Lugar-R
109	Jan. 2005-2006			Hyde-R	Lugar -R
110	Jan. 2007-2008			Lantos-D	Biden -D

The chart above illustrates the four administrations in this research, detailing when the President and Congress were controlled by the same political party. Of the four administrations in this research, three (Reagan, Bush I, and Bush II) were led by Republican Presidents and one (Clinton) was Democratic. Red represents the Republican party, blue is for the Democratic party, and the pink areas show when the Congress had divided control, as for

example, from January 1981 to December 1986 (Reagan administration) when the majority in the House of Representatives was Democratic but the Senate was controlled by the Republican party. The other period of divided control in the Congress, in pink, was June 2001 till the end of 2002, during the Bush II administration when the House of Representatives was under Republican party control and the Senate majority was Democratic. "Session" indicates the congressional session, while "House FRA" stands for the House of Representatives Committee on Foreign Affairs, and "Senate FRC" means the Senate Committee on Foreign Relations.

A few observations about the chart and the problem of political will vis-à-vis the President illustrate the issue of congressional acquiescence. President Clinton, the only Democrat in the study, had to contend with a Republican Congress for the last six years of his presidency, after the Democrats lost control of the legislative branch in the mid-term election of 1994. As explored in the Clinton chapter, Clinton ordered missile strikes in August 1998 in Afghanistan and Sudan after two U.S. embassies were bombed in Tanzania and Kenya. The leadership of the Republican controlled Congress generally applauded his use of force, but because Clinton was weakened politically by the Monica Lewinsky scandal and his party no longer controlled the Congress, he was subjected to congressional speculation that the missile strikes were merely orchestrated to deflect attention away from his personal problems. As the *New York Times* wrote on August 21, 1998:

> *"Across the city, there was an inescapable sense Thursday that the timing of the raid might have been dictated by politics rather than intelligence information. Among the questions that Defense Secretary*

William Cohen faced at the official Pentagon briefing on the air strikes was whether he had seen "Wag the Dog," the satirical film in which a president concocts a war to deflect attention from a sexual encounter with a teen-age girl. He did not bother to answer, instead insisting, "The only motivation driving this action today was our absolute obligation to protect the American people from terrorist activities."

Contrast that situation with President George W. Bush's "war on terror" approach, which garnered little opposition in the Republican controlled Congress from 9/11 until the Democrats gained control over both the Senate and House of Representatives in January 2007. For the first years of the war on terror, the public was shocked by the enormity of the 9/11 tragedy, an atmosphere of continuing crisis prevailed, and few in Congress perceived any political gain in questioning the specifics of the war's track, even when instances of abuse like Abu Ghraib and extraordinary renditions of the wrong person were revealed.

In fact, according to a study by the Brookings Institution on Congress, "there were many more hearings on the alleged abuse by the Clinton White House of its Christmas card list than there were during the Bush administration on Abu Ghraib." (Binder, Mann, Ornstein, and Reynolds, 2009: 14) The Brookings study then reports that the 110th Congress (controlled by Democrats) held more hearings on abuses of power and challenged the Bush II administration to a greater extent than the previous sessions of Congress (led by Republicans), but

"any weakness in the presidency that emerged in the final two years of the Bush White House came primarily from the president's ever-weakening standing with the public and from intervention by the federal courts, not from Congress imposing its own views in sensitive policy areas like surveillance or extracting from the White House testimony from top officials or documents that would shed light on alleged abuses of power, or successfully beating back the uniquely aggressive Bush approach to signing statements". (Ibid, 14-15)

Numerous examples of congressional acquiescence during the Bush II administration exist, particularly in the area of counterterrorism. This may be due to the phenomena of terrorism, i.e. by its very nature, an act of terrorism is intended to terrorize both direct victims and witnesses who, in turn, demand action from the government after a large attack such as the 9/11 tragedy. Responding to terrorism presents a conundrum as the public expects the government to take action against the terrorists and members of Congress sense no political gain from opposing what the President proposes to do, and some political risk if they object to the activity. It is politically more convenient to acquiesce to an executive counterterrorist initiative and wait to see if it actually works. As explained by Savage, "when there are pervasive fears about grave and imminent threats to national security, both the public and Congress historically have tended to be more willing to grant the president extra powers in order to protect the country---powers that later the president may not be willing to put down again especially if it is still unclear whether the crisis is over." (Savage, 2007: 311)

Another dynamic at work after a terrorist attack is the general acceptance of government secrecy. Both citizens and members of Congress accept that counterterrorist activities may require extreme secrecy to be effective, so there tends to be very little complaint or questioning of the executive branch when it claims something must not be publicly disclosed to avoid "tipping off" the terrorists. The Bush II administration maintained that the specifics of its "enhanced interrogation techniques" could not be divulged without alerting the terrorists who would then adapt to the techniques to avoid disclosing valuable intelligence. Sceptics who complained that this emphasis on secrecy also conveniently avoided congressional and public oversight of the executive branch and its detainee policies were ridiculed for not understanding the value of secrecy in counterterrorism. (Fein Interview)

The practice of waterboarding, or stimulated drowning, also illustrates how terrorist incidents and their aftermath of continuing crisis affect political will in Congress. After the Bush II administration admitted that it had used "enhanced interrogation techniques" on Khalid Sheikh Mohammed (he was waterboarded 183 times) in September 2006, the Democrats in Congress could have opposed the use of this technique and opened congressional hearings on the legality of the tactic, but they risked looking "weak" or "soft" on terrorists. Having learned during the Cold War that appearing "weak" on national security made them vulnerable in elections, the Democrats largely acquiesced in the practice, which was defended by Bush II administration officials as being an essential tool for keeping the country safe from al Qaeda.

Judicial Tolerance

The final element in Koh's pattern is judicial tolerance, meaning the tendency of the federal courts in the U.S. to tolerate acts of executive initiative, either "by refusing to hear challenges to those acts or by hearing the challenges and then affirming presidential authority on the merits." (Koh, 1990: 117) This section will briefly describe some of the most important U.S. Supreme Court decisions that interpreted presidential powers in foreign affairs, and sets forth how these decisions have been applied in the realm of national security and counterterrorism. The judicial doctrines that prevent the courts from deciding cases involving national security will be explored as they help explain why the federal courts have repeatedly permitted the executive branch to dominate foreign relations.

The first case, a 1936 decision in *United States v. Curtiss-Wright Export Corporation*, stands for unlimited executive discretion in foreign affairs and is frequently cited by executive branch attorneys when they are claiming expansive powers for the President. The case evolved from a war between Bolivia and Paraguay in the 1930's; in 1934 the U.S. Congress passed a joint resolution authorizing President Franklin Roosevelt to embargo arms shipments to the area, which the President did by issuing a proclamation. The Curtiss-Wright Corporation was subsequently prosecuted for selling fifteen machine guns to Bolivia, but the real impact of the case lies in the opinion by Justice George Sutherland, which is frequently quoted and stands for unchecked executive branch discretion in foreign affairs. Specifically, Sutherland wrote that the President is "the sole organ of the federal government in the field of international relations," and this language has been

used countless times to justify executive branch action in foreign affairs. (Baker, 2007: 39) Koh, a critic of the opinion and its later usage, argued that the *Curtiss-Wright* case incorrectly implies the entire field of foreign affairs falls under the President's inherent authority. (Koh, 1990: 95) He also noted, "over time the *Curtiss-Wright* vision would mysteriously come to embrace another notion previously suggested, but never broadly adopted, by the Supreme Court---that once courts have determined that foreign affairs are at stake, they should dismiss challenges to the executive acts as political, not legal, questions." (Ibid) The reluctance of courts to hear cases involving foreign affairs forms a significant part of the third element of the pattern identified by Koh, i.e. judicial tolerance of executive initiatives.

The other influential case in this area, *Youngstown Sheet and Tube Co. v. Sawyer*, is also known as the "Steel Seizure Case" because it involved President Harry Truman's attempt to seize steel mills to prevent labour unrest from disrupting the provision of steel during the Korean War in 1952. The Supreme Court ruled against Truman, writing that the Commander-in-Chief power did not include the power to "take possession of private property in order to keep labour disputes from stopping production." (*Youngstown*, 1952: 587) This case is often cited as one that limits presidential powers. In addition, the three levels of analysis of presidential actions by Justice Jackson in a concurring opinion remain an important foundation for legal arguments and opinions. According to Jackson,

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its **maximum**, for it

includes all that he possesses in his own right plus all that Congress can delegate.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a **zone of twilight** in which he and Congress may have concurrent authority, or in which its distribution is uncertain.
3. When the President takes measures incompatible with the express or implied will of Congress, his power is at its **lowest** ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. (*Youngstown,* 1952: 635-637)

Although it may appear as an old and esoteric case, *Youngstown* continues to define the contours of the scope of the President's powers in foreign affairs. For instance, instead of endorsing broad concepts of unfettered presidential powers, as the Bush II administration urged in cases brought during the "war on terror," the Supreme Court referred to *Youngstown* and reiterated that Jackson's analysis was still valid law more than 50 years after it was decided.

Later chapters on the Bush II administration explore how President George W. Bush and his advisors endorsed a new paradigm for the "war on terror," which expanded executive branch authority. The theory supporting Bush's new legal paradigm included the proposition that the President, as Commander-in-Chief, may disregard legal boundaries if national security requires it. Cases involving the rights of detainees in the "war on terror," such as *Hamdi v. Rumsfeld* and *Rasul v. Bush*, supplement the analysis because the Supreme Court rejected President Bush's claims that his power as

Commander-in-Chief gave him the authority to disregard acts of Congress. A related case is *Hamdan v. Rumsfeld* in which the Supreme Court used the three tiers from *Youngstown* to reject the Bush II administration's extreme theory of executive power. However, many challenges to Bush II administration legal theories were never adjudicated because federal courts are reluctant to decide cases that involve foreign affairs. By refusing to hear challenges, the courts tolerate acts of executive initiative that violate the goal of balanced institutional participation in foreign relations, the third part of Koh's pattern.

Several American legal doctrines permit federal courts to decline to hear cases; they are the following: standing, ripeness, mootness, the state secrets doctrine, and the political question doctrine. In brief, they prevent the judiciary from reviewing, and possibly forbidding or curtailing, executive branch action in foreign affairs. For example, the doctrine of standing means a plaintiff cannot bring a case against the President unless he has standing to sue and, even if the court finds he has standing, according to the concept of ripeness, they can still decline to hear the case because the issue is not ready or "ripe" for adjudication. Furthermore, courts may also refuse to hear a case because the challenged event has already occurred, making the issue moot. During the Bush II administration, the **state secrets privilege** was frequently invoked by administration lawyers to avoid a ruling on the merits that might have been detrimental to the legal underpinnings of the "war on terror."

The state secrets privilege applies when the subject matter of the suit is itself a state secret; when the plaintiffs cannot make their case without

disclosure of the secret; or when the defendants cannot defend themselves fairly without disclosing the secret. (Baker, 2007: 49) The "moral integrity" of the executive branch lawyer relying on the state secrets doctrine is important in this area, as "the lawyer has an additional duty to test that the information is in fact secret and properly designated so." (Ibid) Countless legal commentators debated whether the Bush II administration was properly using the state secrets doctrine, particularly in cases challenging the legality of extraordinary rendition and eavesdropping by the National Security Agency. Fisher, for instance, examined the Bush II administration's justifications for the warrantless surveillance program exposed by the *New York Times* in a series of articles in December 2005. He described how the administration began using the title "Terrorist Surveillance Program" as soon as it became public and how the administration argued it was legal due to the Authorization for Use of Military Force of September 2001, and the President's "inherent constitutional authority" under Article II of the Constitution. (Fisher, 2008: 292-294) Of course, when a lawsuit is precluded due to the state secrets privilege, there is no way to assess whether the privilege was correctly applied, or whether the government was simply claiming the privilege to hide malfeasance or incompetence.

The final method courts rely on to avoid deciding a case on the merits is known as the political question doctrine. According to this doctrine, courts should refuse to hear a case in three circumstances:

- "where the question presented hinges on a grant of authority that is textually assigned to one or both political branches; for example,

whether the United States should resort to war, which power is committed to the political branches.

- where the matter raised is incapable of discoverable or manageable standards of judicial review. This might be the case, for example, where the president's use of force is challenged on the ground that the force was not 'vital to national security.'
- where the matter is really one of policy disagreement and not law; for example, whether the president was correct to conclude that the intelligence predicate warranted the use of force." (Baker, 2007: 49-50)

The Bush II administration routinely urged federal courts not to hear cases challenging its actions in the "war on terror" based on the political question doctrine. Like the state secrets doctrine, legal commentators debated whether the political question doctrine was properly invoked to avoid adjudication of elements of the "war on terror." The merits of the debate are beyond the scope of this research, but the chapter on the legacy of the Bush II administration returns to the theme of precedents set in the "war on terror" and how they might be used by subsequent administrations for more extreme claims of executive branch power. As noted by one scholar, "every extraordinary use of power by one President expands the availability of executive branch power for use by future Presidents." (Marshall, 2008: 511)

The final point about judicial tolerance of executive branch initiatives concerns the role of executive branch lawyers, in particular, the lawyers in the Department of Justice (DOJ) and its Office of Legal Counsel (OLC). Due to the fact that many challenges to presidential power are not adjudicated by

federal courts, lawyers in the DOJ and OLC who advise the President on the permissibility of an action are the final legal authorities on these issues. In effect, "the executive branch is the final judge of its own authority," and this results in "broad interpretations of executive power." (Marshall, 2008: 512) The personal political outlook of an attorney in the OLC may become relevant in the equation as, for example, when John Yoo, a proponent of the unitary executive theory, wrote legal memos outlining the extent of the President's authority to conduct military operations against terrorists in 2001. According to a former legal advisor to the NSC, lawyers working in the field of national security for the executive branch "may be fueled with the moral integrity to interpret the Constitution in good faith, or they may be fueled by political expedience or a view that the law is whatever we might need or want it to be at a given time, particularly when national security is at stake." (Baker, 2007: 70)

Conclusion

Applied to the four administrations in the context of the use of force in counterterrorism, Koh's pattern is an excellent explanatory lens in which to analyze and assess political behaviour. The executive branch, under pressure from the general public after a large terror attack to do something about terrorism, takes the initiative and uses force to prevent or deter future terrorists. Frequently, the initiative is a brief, sharp application of force like the bombing of Libya in 1986 or missile strikes in 1998, authorized without any input from Congress. The President claims the use of force was lawful under international law as part of the law of self-defence, or even the concept of

anticipatory self-defence. Moreover, the President construes statutes such as the War Powers Resolution as authorizing the action, or he claims inherent war powers to protect the national security of the U.S., thus bestowing the mantle of legality on the use of force. Congress typically fails to check the exercise of power claimed by the President, either because it is controlled by the same political party as the President, or because individual members calculate there is more to lose than gain in challenging presidential actions taken in the name of national security. The judicial branch also fails to check the President usually because judicial avoidance doctrines acerbate the tendency of courts to defer to the executive branch in areas of national security.

As explored further in the Bush II administration chapters, Koh's pattern of executive initiative, congressional acquiescence, and judicial tolerance combined with the 9/11 tragedy and pervasive fears of another attack to create a "perfect storm" of sorts. This perfect storm was the ideal environment for executive initiatives in the treatment of detainees, surveillance of the public, and, most cogent for this research, the use of force. Furthermore, this perfect storm is not just important for its historical value but also because Koh's premise posits that it may happen again, even if the personalities controlling the executive branch are different, in the absence of balanced institutional decision-making in foreign affairs. Just as Koh's admonition that the Iran-Contra affair remains a symptom of the failures of the foreign policy process, this research indicates the "war on terror" was not simply an aberration stemming from overzealous executive branch officials.

In itself, the growth of executive power in the U.S. might only be of concern to American specialists in separation of powers issues and constitutional history. What this thesis is concerned with, however, is the possibility that combined with the unique characteristics of international terrorism and the ability of the U.S. to project force all over the globe, the expansion of executive power in the U.S. has been accompanied by less effective constraints on the use of force. A worst case scenario includes fears about terrorists obtaining WMD's in an attack with catastrophic casualties in the U.S. resulting in executive branch uses of force, more extreme than earlier precedents, with very negative consequences for the world community.

Chapter 4
The Administration of Ronald Reagan

This chapter examines President Ronald Reagan's "War on Terror" from historical, political, and legal perspectives. Upon winning the presidential election in 1980, Ronald Reagan came to office determined to combat international terrorism more forcefully than his predecessor, Jimmy Carter, whose term in office was marred by the hostage crisis in Iran. Indeed, as discussed below, the Iranian hostage crisis contributed to Reagan's electoral win. After a series of well-publicized terrorist incidents in the mid-1980's, Reagan launched the United States' first "War on Terror." After the September 11 attacks, the second Bush administration borrowed from, and expanded upon, concepts and doctrines from the Reagan administration to implement George W. Bush's "war on terror," as discussed in chapters 7 and 8.

Like the Bush "War on Terror," President Reagan's campaign to end international terrorism relied upon his Commander-in-Chief powers and involved the use of military force to punish and deter further attacks. Throughout this chapter, the "War on Terror" (WOT) refers to Ronald Reagan's campaign, unless explicitly stated otherwise. Ronald Reagan was in office for two terms, from 1980 to 1988 when several infamous terrorist attacks occurred including the bombing of the U.S. embassy in Beirut and marine barracks in Beirut, the hijacking of TWA flight 847, the hijacking of the cruise ship *Achille Lauro*, and the destruction of Pan Am 103 over Lockerbie.

During the Reagan administration, the concept of state-sponsored terrorism came into prominence and directly influenced policy-makers; it is defined as “the active and often clandestine support, encouragement and assistance provided by a foreign government to a terrorist group” (Hoffman, 1998: 23). While members of the Reagan administration may have anticipated contending with Communist terrorist groups and plots “orchestrated by the Kremlin and implemented by its Warsaw Pact client states,” by 1985, they were focusing on state-sponsored terrorism as a “type of covert or surrogate warfare whereby weaker states could confront larger, more powerful rivals” (Hoffman, 1998: 27).

Historical Context

Ronald Reagan defeated President Jimmy Carter (a Democrat) in 1980 partially due to the American public’s concern about the weak economy. Carter was also portrayed by Reagan as a foreign policy failure due to the Soviet invasion of Afghanistan in December 1979 and the Iranian hostage crisis. The hostage crisis, which began on November 4, 1979 when Ayatollah Khomeini’s Revolutionary Guards seized control of the U.S. embassy in Teheran, dominated the media. The Iranian students seized 66 American personnel, including those with diplomatic status, and 52 of the hostages were held for 444 days in an ordeal that was televised to the American public and discussed constantly. After repeated efforts to end the standoff peacefully failed to work, President Carter authorized a rescue attempt to free the hostages. On April 24, 1980, the rescue mission was forced to abort after encountering difficulties in the Iranian desert; eight U.S. servicemen were killed and four injured in the attempt. For many Americans, the failed rescue

added to a sense of American impotence regarding terrorism and incompetence on the part of the Carter administration in dealing with it. (Martin and Walcott, 1988: 42) One year after the students took over the U.S. embassy, on November 4, 1980, Ronald Reagan was elected President. The day Reagan took the oath of office, January 20, 1981, the remaining 52 hostages were released and left Iran. One week later the new President set the tone of his administration's rhetoric regarding terrorism by stating, "Let terrorists beware that when the rules of international behavior are violated, our policy will be one of swift and effective retribution." (Wills, 2003: 1)

Many conservatives who came to Washington with the Reagan administration in 1981 arrived with the same strong worldview about the Soviet Union as Ronald Reagan; it was an "evil empire" with an insatiable desire to dominate and control countries around the globe. In addition, it was the mission of the United States, as leader of the free world, to resist this domination wherever possible. This worldview acerbated the tendency to analyze international tensions and policy challenges through the prism of the East-West ideological divide and to view things in a "black or white" dichotomy. The problem of terrorism was no exception to this tendency; an example of this is a book by Claire Sterling called *The Terror Network* that explored terrorism as a "calculated means to destabilize the West as part of a vast global conspiracy." (Hoffman, 1998: 27) The perception that international terrorism was part of a Soviet effort to dominate the world may have persuaded many in the Reagan administration to believe it was more analogous to warfare than to criminal activity, a perception with important policy implications.

The goal of the "Reagan doctrine," a term used to describe Reagan's foreign policy, was stopping the perceived expansion of Soviet power and communist ideology. Instead of containing communism, the conservatives under Reagan wanted to roll communist countries back by increasing the Defense Department budget, developing new weapons, and helping anti-communist forces in states such as Nicaragua and Afghanistan. (Evans and Newham, 1998: 464). A related concept was the "Shultz doctrine" named for the Secretary of State who advocated using military force "not only against terrorists, but also against states that support, train or harbor terrorists." (Paust, 1986: 711) The Reagan administration did not use the Reagan doctrine as a legal justification for the use of force; rather it was a political statement about policy and goals.

Some of the most important players in the Reagan administration regarding terrorism include the following: Secretary of State George Shultz, Secretary of Defense Caspar Weinberger, and the Director of the Central Intelligence Agency (CIA) William Casey. George Shultz was Secretary of State from 1982 to 1989 and equated terrorism with warfare. (Shultz, 1993: 645) In his book, *Turmoil and Triumph*, Shultz explained that the U.S had to become more aggressive regarding terrorism by responding with force so that terrorists would learn acts of terrorism do not work. (Shultz, 1993) In October 1984, Shultz gave a speech at the Park Avenue Synagogue in New York City and declared, "The United States must be ready to use military force to fight terrorism and retaliate for terrorist attacks even before all the facts are known." (Maogoto, 2005: 90)

Many of Shultz's views of terrorism from the 1980's became standard rhetoric in the second Bush administration. In 1984 he affirmed, "We must reach a consensus in this country that our responses [to terrorism] should go beyond passive defense to consider means of active prevention, preemption, and retaliation." (Henninger, 2006) A *Wall Street Journal* editor named him the "father of the Bush Doctrine" for his advocacy of preempting threats well before the 9/11 attacks. (Ibid) After 9/11, Shultz, a former marine, approved of Bush's war on terror approach, stating, "The law-enforcement mentality is not going to do the job for us. You have to have a war mentality. You have to have an offense and defense; you have to be active about it." (Ibid) However, in the 1980's, these views of terrorism did not find the same level of acceptance that they received after the 9/11 tragedy.

Shultz's readiness to use military force contrasted with the Secretary of Defense, Caspar Weinberger, who held that office from 1981 until 1987 (when he was implicated in the Iran-Contra Affair). Weinberger viewed terrorism as criminal activity but not warfare and frequently clashed with Shultz over the most appropriate means for the U.S. to respond to terrorists. (Wills, 2003: 30) For Weinberger, six criteria needed to be evaluated prior to committing U.S. combat troops abroad:

- The mission had to be in the vital interests of the U.S.
- Overwhelming force should be used for a decisive victory.
- There should be clearly defined military and political objectives.
- The situation should be continually reassessed.

- There must be reasonable assurance---*before* committing combat forces abroad---that both the mission and troops have the support of the American people and Congress.
- The commitment of troops should be the last resort.

(Weinberger, 2001: 309-313)

Shultz, who advocated using military force against terrorists, concluded that Weinberger's criteria applied to a "major, conventional war" but amounted to "a counsel of inaction bordering on paralysis" in the face of terrorists. (Shultz, 1993: 650) The inability of Weinberger and Shultz and their closest aides to agree on the nature of terrorism (was it war or crime?) frequently led them to disagree on the fundamental question of how to respond appropriately to acts of terrorism.

Another notable personality influencing Reagan's WOT was the director of the CIA from 1981 until his death in 1987, William Casey, a man described as a conservative who was "fixated on the Soviet Union" and firmly committed to halting the spread of Marxist-Leninist ideology. (Coll, 2004: 92) When Casey took over at the CIA, he applied the "message endorsing action, entrepreneurship and simplicity" from the book *In Search of Excellence: Lessons from America's Best-Run Companies* to improve the CIA. (Woodward, 1987: 314) He also viewed terrorism as warfare, not criminal activity, and supported Shultz in advocating the use of military force to fight terrorists. (Wills, 2003: 33) After the Soviet Union invaded Afghanistan in December 1979, the Carter administration sent approximately $75 million dollars to the mujahedin soldiers who were fighting the Soviet army. (Persico,

1990: 225) Although most members of the Reagan administration disdained Carter's foreign policy initiatives, aid to the mujahedin was viewed as a way to counter the forcible spread of communism without sending American troops, so Casey continued it. (Ibid) The possibility of the mujahedin later opposing the U.S. and forming a non-state terrorist network, al Qaeda, never seems to have occurred to Casey and those who funded the anti-Soviet campaign.

Colin Powell, who held various posts in all four administrations in this study, worked in the Reagan administration as National Security Adviser from 1987 to 1989. He then became Chairman of the Joint Chiefs of Staff in the first Bush administration and the Clinton administration (1989-1993). During the second Bush administration, Powell, by then the Secretary of State, presented the American case for invading Iraq to the UN in February 2003. In his book, *My American Journey*, Powell remarked upon the continuing tension between Weinberger and Shultz while cautiously avoiding agreement with either man's views on terrorism. (Powell, 1995) In addition, Powell endorsed Weinberger's rules on committing U.S. forces to combat, writing that they operated as a "practical guide" by Powell when he advised Presidents on the desirability of committing troops abroad. (Powell, 1995: 303)

Other influential people in the Reagan administration were Robert McFarlane, National Security Advisor from 1983 to 1985, and John Poindexter, assistant to the President for National Security Affairs from 1981 to 1986. Both McFarlane and Poindexter were involved in the Iran-Contra scandal; McFarlane plead guilty to four counts of withholding information from Congress and was pardoned by the first George Bush in 1992 and Poindexter

was convicted of multiple felonies in 1990 but the convictions were reversed a year later. Finally, Abraham Sofaer, legal advisor at the State Department during the latter half of Reagan's term, provided explicit legal backing for the administration's use of force against terrorists. His published works on terrorism and the law were assessed in the literature review chapter. As some of the most important participants in Reagan's foreign policy team, these men were responsible for shaping and implementing counterterrorism policy.

Counterterrorism Policy under Ronald Reagan

Ronald Reagan took office in 1981 determined to change many Carter administration policies including counterterrorism. While the Carter administration championed human rights, the new Reagan administration "announced international terrorism would replace human rights as the number –one issue for the U.S." (Weiner, 2007: 388) Terrorist incidents increased throughout the 1980's with half of the incidents "aimed at only 10 countries; one-third of the total were targeted directly at the US." (Task Force Report, 1987: 8) From the start of his administration, Reagan pledged a policy of "swift and effective retribution" against terrorists; the second pillar of his policy was "making concessions to terrorists was not an option." (Wills, 2003: 4) State sponsorship of terrorism dominated the foreign policy agenda of the administration and the two main sponsors of terrorism, the Soviet Union and Libya, received most of the administration's attention. In fact, during a hearing by the Senate Subcommittee on Security and Terrorism in 1986, Ambassador Robert Oakley, Director of the Office for Counterterrorism and Emergency Planning at the State Department, called Libya "far and away the most active supporter of terrorism, especially against Americans and Europeans." Libya

was designated a “state sponsor of terrorism” in 1979 under the Export Administration Act, during the Carter administration, and this meant it was subject to export restrictions. Libya’s designation as a state sponsor of terrorism was not rescinded until June 2006 during the second Bush administration.

The Vice President’s task force on combating terrorism, chaired by Vice President George H. W. Bush, concluded in 1987 that U.S. policy was “no concessions to terrorists.” (Task Force Report, 1987: 12) In addition, the task force noted that the U.S. government was prepared to act “unilaterally when necessary to prevent or respond to terrorist acts.” However, the Reagan administration’s strong rhetorical stance did not always result in the use of force or other counterterrorist activity. In many cases in the 1980’s, the empirical evidence reveals the strong rhetoric did not match reality in that there was no response by the Reagan administration to terrorist acts. Specifically, one study identified 636 terrorist incidents from January 1981 to January 1989 (the Reagan years) and “in the overwhelming majority of cases, the administration did not respond at all.” (Wills, 2003: 6) Sometimes the terrorist incident was minor and other times the lack of clear evidence as to culpability or the whereabouts of the perpetrators made responding too difficult. In other cases, the government response was not swift and effective retribution, but rather, defensive measures such as improving security at potential targets and increasing intelligence gathering capabilities. (Ibid) In addition, despite all the talk in the 1980’s about combating terrorism, the President and Congress were slow to enact laws to protect American citizens. It was not until 1984, for instance, that taking an American hostage overseas

became a crime under U.S. law and only in 1986 did assaulting, maiming, or murdering a U.S. citizen anywhere in the world became a crime. (Martin and Walcott, 1988: 367)

Much of Reagan's counterterrorism rhetoric "reflected the scene, characters, and themes of Cold War discourse," with the Soviet Union occupying the position of evildoer. (Winkler, 2006: 80) The Reagan administration tended to focus on one region of the world, Central America, and on Lebanon, where they believed democracy was fragile and under attack. Throughout his two terms, Reagan portrayed the Soviet Union as the "evil empire" bent on destructive expansionism, with assistance from its satellite states and often working through the tactic of terrorism. Winkler detailed how Reagan transformed the political debate on counterterrorism so that "terrorism became less about individuals committing crimes and more about the Soviet Union and its client states permitting and encouraging terrorism as the means of furthering their ideological perspective." (Winkler, 2006: 82) As the public became more accustomed to viewing international terrorism this way, responding with the use of force, as opposed to law enforcement methods, became more of an acceptable option.

The following sections examine the major terrorist incidents of the Reagan administration by describing the events and detailing the response, if any, of the administration. In addition, in the cases where the administration responded with force, the administration's legal justification for the use of force and the international community's reaction are analyzed. The pattern of executive initiative, congressional acquiescence, and judicial tolerance,

expounded by Koh and explained in chapter three, is the lens applied to assess how the Reagan administration responded to international terrorism in the 1980's.

Marine Barracks Bombing

In June of 1982, Israeli troops under the direction of Prime Minister Menachem Begin and Defence Secretary Ariel Sharon invaded Lebanon to move Palestinian Liberation Organization (PLO) forces north. Some critics accused the Secretary of State, Alexander Haig, of tacitly agreeing to the Israeli invasion, but Haig denied it. Although the PLO was eventually expelled from Lebanon and the Syrian troops fighting the Israeli army suffered more casualties, it is often cited as an Israeli political failure despite their military victory. Graphic images of civilian deaths in the media helped turn world public opinion against the Israeli invasion. American policy toward Lebanon soon became "the withdrawal of all foreign forces from Lebanon, a sovereign, independent Lebanon, and security for Israel's northern border." (Wills, 2003: 50)

In August of 1982, eight hundred U.S. marines were sent to Lebanon to facilitate the evacuation of the PLO from Beirut. Secretary of Defense Weinberger resisted the deployment of the marines from the beginning because he feared the assignment was too vague. On September 10, 1982, the marines left Lebanon and returned to U.S. ships in the Mediterranean. However, two events quickly brought them back into Beirut: President-elect Bashir Gemeyel was assassinated on September 14, and Israeli Defence Minister Sharon allowed Phalange militiamen to kill over 700 Palestinian

civilians in the Sabra and Shatilla refugee camps. (Wills, 2003: 53) Disturbing images of dead Palestinians put pressure on the Reagan administration to prevent more violence.

The second deployment of marines, part of a multinational force with French and Italian troops, entered Lebanon to stabilize the political situation and allow the Lebanese government to reestablish control over its territory. Secretary of Defense Weinberger and the Joint Chiefs of Staff were opposed to the second marine deployment due to the "intractable political and military problems on the ground," but their caution was overruled. (Martin and Walcott, 1988: 97) Intelligence reports that indicated possible terrorist attacks against American installations were ignored and on April 18, 1983, a truck bomb exploded outside the U.S. embassy in Beirut, killing 63 people, 17 of them Americans. A group called Islamic Jihad claimed responsibility for the attack, which indicated Hezbollah and Iranian involvement. In a sharp departure from the rule of law, one CIA officer, Keith Hall, extracted confessions from four suspects arrested by the Lebanese with "overly harsh" techniques that led to Hall's discharge from the CIA. (Martin and Walcott, 1988: 105)

Despite the vulnerability of their position, the marines remained near the Beirut airport and on October 23, 1983 suffered their largest single-day losses since the Vietnam War when a truck bomb destroyed the marine barracks, killing 241 Americans. Shortly thereafter, another bomb exploded at the French headquarters, killing 59. After the bombing of the marine barracks, President Reagan stoutly declared that he was committed to keeping

American forces in Lebanon to complete the “peacekeeping” mission. Two days later, on October 25, U.S. forces invaded the tiny island of Grenada and a storm of controversy engulfed the Reagan administration as questions were asked about the legality of invading Grenada. In addition, the Reagan administration was forced to deflect questions about whether the timing of the Grenada invasion was intended to turn attention away from the sight of dead and wounded marines in the rubble in Lebanon. Although unrelated events, the invasion of Grenada and the bombing of the marine barracks in Beirut both threatened to derail Reagan’s hopes for re-election.

In the aftermath of the marine bombing many in the Reagan administration called for strong action against the terrorists who had carried out the attack. The first problem was gathering intelligence to determine who to retaliate against and how. After its investigation, the CIA concluded that the “bombings on October 23 of the U.S. and French MNF headquarters were carried out by Shia radicals armed, trained and directed by Syria and Iran.” (Wills, 2003: 70) The U.S. military drew up plans for retaliatory air strikes but never carried them out; the exact reason why remains obscure. In his memoirs, Reagan claimed he cancelled the air strikes out of concern that the targets were not appropriate but Weinberger later said he did not recall the president “even coming close to ordering an attack.” (Wills, 2003: 75) In stark contrast to the American non-response, the French bombed the Sheik Abullah Barracks in Lebanon’s Bekaa Valley on November 17, 1983. (Martin and Walcott, 1988: xvii)

As explained by the chart in chapter 3 on party affiliations of presidents and congress, President Reagan dealt with a divided congress (the Senate was controlled by the Republican party while the House of Representatives was in the hands of the Democrats) from January 1981 until January 1987 when the Democrats took control over both houses. Unlike President George W. Bush, whose two terms in office were spent mainly interacting with a Republican controlled congress until January 2007, Reagan was forced by political reality to reach some accommodation with the Democrats as they controlled the levers of spending and congressional oversight. In addition, the Reagan era was not marred by the extreme party polarization that marked the Clinton and Bush II administrations, when political party affiliation increasingly became more important for predicting how individual members of congress might vote on a particular issue.

The War Powers Resolution (WPR) did not significantly constrain President Reagan's deployment of U.S. forces in counterterrorism activities, notwithstanding the intentions of the WPR drafters in 1973. When Reagan first ordered the marines into Lebanon, he did not consult with members of Congress, but instead based the deployment on his "constitutional authority with respect to the conduct of foreign relations and as Commander-in-Chief." (Fisher, 2004: 160) Reagan did send a war powers letter to congress, but did not report the deployment of U.S. troops under section 4(a)(1) of the WPR, to avoid triggering the sixty day "clock" that would have required the troops be brought home, or an extension. In response, on October 12, 1983, Congress passed legislation stating that the "clock" stipulations of section 4(a)(1) became operative on August 29, 1983. However, in a major weakening of an

already weak constrain on presidential deployments of force, Congress permitted the military action in Lebanon for 18 months. (Fisher, 2004: 160) President Reagan responded to this mild assertion of congressional will with the announcement that he "felt no constitutional obligation to seek congressional authorization after the expiration of the 18-month period if, in his view, further use of military action was necessary." (Fisher, 2004: 161) Tragic events overtook politics with the explosion of a bomb in front of the marine barracks on October 23, 1983, detailed above.

Reagan's political advisors feared that the Democrats would use the bombings and continued deployment of the marines in Lebanon to defeat Reagan in his 1984 re-election campaign. They did not want Reagan's policies to become enmeshed in Lebanon as the Carter administration had become bogged down by the hostage crisis in Iran while public and congressional support for the mission in Lebanon was collapsing. (Martin and Walcott, 1988: 148) Despite his earlier assertions that the troops were on a humanitarian mission that would be completed despite the violence, Reagan began withdrawing troops from Lebanon until the last marine was withdrawn on February 26, 1984, well before the 18-month period granted by Congress ended. The Reagan administration always denied that there was a cause and effect relationship between the barracks bombing and the marines' departure, but this may have been the interpretation of future terrorists who believed the U.S. lacked the political will to sustain a military engagement with heavy casualties.

Although it failed to strike militarily after the marine barracks bombing, the Department of Defense did establish a commission to study what went wrong and how to prevent it from happening again. The Long Commission issued its report in December of 1983, concluding that the marines in Beirut were "not trained, organized, staffed, or supported to deal effectively with the terrorist threat in Lebanon. (Long Commission, 1983: 121) In addition, the commission recommended that the U.S. have "an active policy" to combat terrorism because "a reactive policy only forfeits the initiative to the terrorists." (Ibid) Based on the recommendations of the Long Commission, National Security Decision Directive (NSDD) 138 was drafted and then signed by Reagan on April 3, 1984. (Winkler, 2006: 93) This important executive branch directive remains partially classified, although some of its main points are described in various accounts about the Reagan administration. For instance, one important finding was that terrorism is a form of aggression and therefore the U.S. is justified in acting in self-defence under international law. It also authorized "active defense measures" including preemptive military strikes against terrorist groups located in states unable or unwilling to take effective action. NSDD 138 has been described as "a seminal shift in the administration's officially sanctioned approach to terrorism" which authorized the use of preemptive and retaliatory strikes, deception, and expanded the ability of the intelligence community to gather information on terrorists. (Wills, 2003: 83-84)

The situation in Lebanon continued to deteriorate and it became increasingly dangerous for Americans and other Westerners to remain there; several were kidnapped in Beirut and held hostage for years. Reagan's

Secretary of Defense and his Secretary of State, Weinberger and Shultz, continued to disagree on the proper role of U.S. military forces in counterterrorism operations. Ultimately, the inability of Western governments to negotiate the hostages' release led to a small group of staffers in the National Security Council (NSC) to take matters into their own hands to initiate an unconventional method of hostage release. The resulting Iran-Contra affair in which executive branch officials attempted to sell arms to Iran in exchange for the release of the hostages in Lebanon is discussed below.

Hijacking of TWA Flight 847

The next real test for the Reagan administration's counterterrorism policy was the hijacking of TWA Flight 847 in 1985. On June 14, 1985, two Shia Lebanese gunmen hijacked TWA Flight 847 as it was flying from Athens to Rome. There were 153 passengers on board, including 135 Americans. The hijackers demanded that more than 700 Lebanese Shiites be released from an Israeli prison, in addition to the release of more Shiites from prisons in Kuwait, Spain, and Cyprus. (Martin and Walcott, 1988: 169) On the second day of the hijacking, while on the ground in Beirut, the hijackers shot and killed a U.S. Navy diver. The hijackers then threw the body of Robert Stetham out of the plane, onto the tarmac. As the hijacked plane flew from Algeria to Lebanon and then back again, the hijacking became a media event with American television showing interviews with the hostages and the hostages' families; the families spoke about their frustration with the Reagan administration's response to the hijacking. On June 19 in Beirut an American news crew was allowed to interview the crew of the hijacked plane; this gave Americans watching at home visual confirmation of the crew's plight and it

gave the hijackers another way to publicize their demands. This added to the pressure put on the administration to end the hijacking without further bloodshed. Behind the scenes, the Reagan administration was trying to get the Israeli government to speed the release of the Shiites taken in Lebanon, but the Israelis did not want to appear to be giving in to terrorists.

The Reagan administration also sent an elite military force called Delta to Cyprus to attempt a rescue similar to the Entebbe raid in which Israeli forces had rescued Israeli and Jewish passengers from an Air France plane in Entebbe, Uganda in 1976. However, the Delta force never got close enough to the hijacked TWA plane to attempt a rescue because the hijackers realized that an American military force might be sent and so they ordered the pilot to keep flying. Ultimately, the plane ended up in Beirut where the pilot told the hijackers that it could not take off again without a new engine. (Martin and Walcott, 1988: 184) Some of the passengers had been released by the hijackers earlier in Algiers; the rest were taken off the plane, still in captivity, to be held hostage in different spots in Beirut. Negotiations continued for days, until June 30 when the remaining hostages were driven to Syria, delivered to the American ambassador to Syria, and then flown to Germany by the U.S. Air Force.

The results of the hijacking were varied; the liberation of the hostages was followed by the liberation of 735 Shiite prisoners held in Israel, although the Israeli government maintained that there was no connection because the release of the Shiites had been planned *before* the start of the hijacking. The Reagan administration was relieved that the death toll had not been higher

and became convinced that the key to releasing hostages in Lebanon was held by Iran (Martin and Walcott, 1988: 202). The ability of a spectacular terrorist event to consume TV and newspaper headlines was demonstrated once again, along with the ability of a few armed terrorists to put pressure on the U.S. government to act, or at least to be seen acting. Furthermore, the administration ordered a review of counterterrorism policy and this became the Vice Presidential Task Force on Combating Terrorism, which issued its report in 1987. Secretary of State Shultz and the NSC staff argued that the U.S. should retaliate with force for the hijacking, but this option was not followed, probably due to the seven Americans still held hostage in Beirut. (Wills, 2003: 134)

The hijackers of TWA 847 largely remain free; in October 2001, President George W. Bush announced the formation of an FBI Most Wanted Terrorists list and it included the names of three of the hijackers, Imad Mugniyah, Ali Atwa, and Hassan Izz-Al-Din. Hezbollah subsequently claimed Mugniyah was killed by a car bomb in Syria in 2008, but this is unconfirmed. Finally, another hijacker, Mohammed Ali Hammadi, was arrested in 1987 in Germany, tried, and convicted for the murder of American Robert Stethem. However, instead of serving the life sentence he received during his trial, he was released in 2005 and returned to Lebanon; the U.S. requested his extradition in 2006 to be tried for murder and hijacking, but this has not occurred as of 2012.

Achille Lauro **Affair**

On October 7, 1985, the Italian cruise ship *Achille Lauro* was hijacked by four armed men as it sailed from Alexandria to Port Said. The men, members of the Palestinian Liberation Front (PLF), demanded the release of 50 Palestinians held in Israeli prisons. At the time of the hijacking, there were approximately 400 people on board and one of the first things the hijackers did after taking control of the ship was to single out the American and British citizens and put them on deck surrounded by open cans of petrol. (Wills, 2003: 140) The Reagan administration quickly learned of the hijacking and made plans for a rescue operation, believing that a rescue at sea would be possible because, as long as the ship stayed at sea, it was isolated and vulnerable. A Special Operations Command (JSOC) force left the next day for the NATO air base at Sigonella, Sicily to plan a rescue mission. (Martin and Walcott, 1988: 238) In addition, not only would a rescue operation be easier if the ship stayed in open seas, there would be no media circus with TV interviews of the hostages and hijackers. The Reagan administration was increasingly concerned about the impact publicity-seeking terrorists had on the press and public.

On the second day of the hijacking, as the ship waited outside the port of Tartus, Syria, the hijackers grew angry waiting and shot and killed an American tourist, Leon Klinghoffer, who was wheelchair-bound. On the third day of the hijacking, in Egyptian waters, negotiations with the hijackers accelerated and the Egyptian government worked out a deal which it presented to the U.S. and Italy: the hijackers would surrender to Egyptian authorities. (Wills, 2003: 148) The next day, President Mubarak of Egypt told the news media that the hijacking was over and that the hijackers had left the

country. However, the hijackers had *not* left Egypt, and Israeli intelligence tracked their whereabouts and passed along this information to the Reagan administration. When the U.S. confirmed that an American citizen, Klinghoffer, had been killed, the Reagan administration became adamant that the hijackers be captured and brought to justice. Several members of the NSC staff, including Oliver North, worked on a plan using Israeli intelligence to intercept the plane carrying the hijackers as they fled Egypt. (Martin and Walcott, 1988: 245)

Secretary of Defense Weinberger did not approve of the plan, which involved using U.S. military aircraft to intercept an Egyptian civilian airliner, but "Reagan was determined to proceed." (Martin and Walcott, 1988: 249) On October 9, U.S. Navy jets forced the EgyptAir plane carrying the hijackers to land in Sicily and Delta force troops quickly surrounded the plane; then the Delta troops were quickly surrounded by Italian troops. Italian Prime Minister Craxi insisted that the Italians had jurisdiction because the hijackers were on Italian soil and the hijacked ship had been Italian. A diplomatic standoff ensued for four hours, with Italian troops surrounding the American forces until negotiations between the U.S. and Italy resolved the situation.

In the end, the Italians brought charges against three of the four hijackers, who received long sentences. One of the hijackers, Abu Abbas, was released by the Italians but captured later by U.S. Special Forces; he was found on the outskirts of Baghdad in 2003 after the U.S. invaded Iraq. The Italian government collapsed on October 17, 1985, partially due to the standoff with the Americans and subsequent handling of the hijackers. Not

surprisingly, relations between the U.S. and Egyptian governments were strained after the interception of EgyptAir. (Wills, 2003: 161) In addition, the legality of the U.S. interception of the Egyptian aircraft was hotly debated, with some analysts calling it an illegal use of force. For the Reagan administration, particularly the NSC staff, it was a triumph, which confirmed for many the utility of using military force in counterterrorism operations. The attraction of "going on offense" against terrorists and initiating executive branch counterterrorist plans without significant congressional input remained with the Reagan administration from the interception of EgyptAir.

Terrorist Attacks at the Rome and Vienna Airports

In two nearly simultaneous attacks, Abu Nidal terrorists killed 18 passengers waiting in the Rome and Vienna airports on December 27, 1985 with guns and hand grenades. The dead and injured included American tourists; when Reagan was told, he was filled with "revulsion" and "anger" and the option of swift and effective retribution immediately came up as a methods of preventing more terrorist attacks. (Wills, 2003: 176) However, it was necessary to first gather intelligence to determine who aided the terrorists and how to retaliate. One terrorist was captured alive and subsequent investigations indicated that two countries helped carry out the attacks: Libya by providing Tunisian passports confiscated or stolen from Tunisian citizens working in Libya, and Syria by providing training at camps in the Bekaa Valley in Lebanon by Syrian agents. (Martin and Walcott, 1988: 268) Qaddafi augmented his reputation as a head of state who supported terrorism by hailing the attacks as "heroic actions." During the Carter administration in

1979, the U.S. officially designated Libya as a country that supported acts of terrorism and subsequent bellicose rhetoric from the Libyan head of state reinforced this designation.

Secretary of State Shultz once again argued that the U.S. should carry out a military strike against Libya and members of the NSC staff agreed that force was justified in this instance. In addition, Abraham Sofaer, legal counsel at the State Department, advised that terrorism was a form of armed aggression, which allowed the victim state to use military force in defence. (Wills, 2003: 181) In an article examining Article 51 of the UN Charter, which grants states the right to self defence if an armed attack occurs against a state, Sofaer wrote that "a sound construction of Article 51 would allow any state, once a terrorist attack occurs or is about to occur, to use force against those responsible for the attack in order to prevent the attack or to deter further attacks." (Sofaer, 1989: 95) For Shultz, this was a policy of "active defense" and it enabled the U.S. to proactively strike terrorists or the states, like Libya, that sponsored them.

However, Secretary of Defense Weinberger opposed military action against Libya, partially due to the possibility that Qaddafi might take Americans working in Libya at the oilfields hostage. He also felt other alternatives should be considered and implemented before a military strike. (Martin and Walcott, 1988: 181) In the end, Reagan decided not to use the military, but rather to implement more diplomatic and economic sanctions against Libya to curtail its support of the Abu Nidal organization. For example, Reagan signed Executive Order 12543 on January 7, 1986 which imposed

new economic sanctions on Libya and NSDD 205 the next day, which banned all direct imports and exports with Libya, prohibited travel to Libya, and barred Libyan-flagged ships from entering U.S. ports. (Wills, 2003: 184-5) As is frequently the case with economic sanctions, the problem was enforcement and uniformity of application. Only Canada fully supported the U.S. position.

The political situation between the American administration and Qaddafi continued to deteriorate with increasingly bellicose rhetoric on both sides as tensions mounted. For instance, Qaddafi created what he called the "Line of Death" across the Gulf of Sidra, claiming all the waters within the gulf were Libyan territory and then he forbid all other countries from passing through this line. The U.S. Navy engaged in naval exercises in the Gulf of Sidra to demonstrate that, outside of the usual 12-mile territorial sea, the rest of the gulf was high seas and open for navigation. On March 24 and 25, 1986, Libyan ships attacked the U.S. Navy during such an exercise and two Libyan patrol boats were sunk. (McCredie, 1987: 215) Some scholars have questioned the purpose of sending the U.S. Navy into the Gulf of Sidra, theorizing that it was "to provoke a Libyan armed attack which would serve as a justification for the use of armed force in response." (Murphy, 1986: 88)

Bombing of the *La Belle Disco* in Berlin

On April 2, 1986, a bomb exploded on a TWA flight from Rome to Athens, killing four American citizens, including an infant. The "Arab Revolutionary Cells," another name Abu Nidal used, claimed responsibility, saying the bombing was "in retaliation for America's actions in the Gulf of Sidra." (Wills, 2003: 195) On April 5, a bomb exploded in the La Belle Disco

in West Berlin, killing two U.S. soldiers and a Turkish woman; more than 200 people, including many other U.S. soldiers, were injured.

After the La Belle Disco bombing, the Reagan administration claimed it had solid evidence of Libyan involvement. The evidence was twofold: the British General Communications Headquarters had intercepted a message from the Libyan People's Bureau in East Berlin to Tripoli describing a "joyous event" that was going to happen soon, and after the bomb exploded, the British intercepted another message which reported the operation had been successful and could not be traced to the People's Bureau. (Martin and Walcott, 1988: 286) The bombing of the disco seemed to provide the Reagan administration with a "smoking gun" and a clear-cut terrorist attack that called for the implementation of Reagan's policy of swift and effective retribution. Shultz and the other advocates of proactive measures against terrorism urged Reagan to order military strikes against Libya to illustrate American resolve.

Bombing of Libya: Swift and Effective Retribution?

Early on April 15, 1986, U.S. Air Force and Naval aircraft bombed targets in Libya; the air strike hit the Tripoli Military Air Field, Aziziyah Barracks, Sidi Balal Training Camp, Benina Military Air Field, and Benghazi Military Barracks. (Intoccia, 1987: 179) The death toll was 37 people killed, including Qaddafi's adopted daughter, and 93 injured; two U.S. airmen were also killed when their plane crashed. In addition, the Pentagon admitted that U.S. planes "inadvertently hit civilian areas." (Intoccia, 1987: 180) The air strikes brought a storm of criticism of the Reagan administration's WOT and its use of military force against Libya. For example, Greece and Italy

denounced the air strikes as “set[ting] dynamite to peace” and thousands of demonstrators protested the American action in West Germany, Italy, Sweden, and Great Britain. (Intoccia, 1987: 187-188) A resolution in the UN Security Council condemning the strikes was vetoed by France, the U.S, and UK, but many other countries in the Security Council disapproved of the American action. (Maogoto, 2005: 93) In contrast to the Security Council, the UN General Assembly passed a resolution condemning the American air strikes by a vote of 79 to 28, with 33 abstentions.

Prior to sending U.S. planes to Libya, the Reagan administration sought the support of key European allies such as France and Great Britain. President Mitterrand of France refused to give the U.S. permission to fly over French territory, so the American planes had to fly the long way around the continent to reach Libya. (Martin and Walcott, 1988: 293) In Britain, Prime Minister Thatcher’s decision to allow the American planes to launch from British bases was deeply resented by members of the opposition party and public. Before granting her permission, Mrs. Thatcher, who was “on record as saying that ‘retaliatory strikes’ against Libya would be ‘against international law,’” wanted assurances from the State Department that the air strikes were “fully consistent” with the right of self-defence in Article 51 of the UN Charter. (Martin and Walcott, 1988: 290) According to Reagan’s diaries, Mrs. Thatcher sent Reagan a long message of support a few days before the strikes, but expressed concern about civilian casualties. (Reagan, 2007: 403) Reagan noted, “That’s our concern also.” (Ibid) Reagan does not mention soliciting any input from Congress.

As noted in chapter 1, the right of self-defence in Article 51 of the UN Charter is subject to certain conditions such as necessity, imminence, and proportionality. Acts taken in legitimate self-defence must be strictly necessary to protect against an "armed attack" and the amount of force used in response must be proportional to the amount of force used in the initial attack. Legal scholars who support a narrow right of self-defence believe it "arises only if an armed attack occurs" as this right is an exception to the general Charter prohibition on the threat or use of force found in article 2(4). (Gray, 2004: 98) On the other side are writers who argue that the right of self-defence is broader because the UN Charter preserves the "wide customary international law right of self-defence, allowing the protection of nationals and anticipatory self-defence." (Gray, 2004: 98) Clearly, the Reagan administration based its actions on a broad interpretation of self-defence.

The Reagan administration was careful in its official pronouncements regarding the air strikes in Libya; Reagan cited self-defence under Article 51 as the legal basis for the bombing and avoided calling them reprisals. He also referred to the strikes as "preemptive action" against Qaddafi's terrorist installations. For many analysts, the air strikes fit uneasily into Article 51 as measures taken in self-defence for several reasons. Article 51 provides a right of self-defence in the event of an armed attack, so the question was whether Libyan actions such as the La Belle Disco bombing, support for the Abu Nidal organization, Gulf of Sidra provocations, and possible involvement in the Rome and Vienna airport killings constituted an "armed attack" under international law, triggering the right to respond in self-defence. The Reagan administration claimed that the **cumulative effect** of Libyan activities

amounted to an “armed attack,” a position not shared by all scholars of international law. For instance, O’Connell argued terrorist acts, typically sporadic events, are generally treated as **criminal acts** because “they have all the hallmarks of crimes, not armed attacks that can give rise to the right of self-defense.” (O’Connell, 2010: 14)

In addition, the issue of imminence was debated because normally the act of self-defence should occur very close in time to the armed attack. However, the U.S. air strikes in Libya came 10 days after the last incident, the bombing at the La Belle Disco (April 5, 1986). The U.S. offered no concrete evidence that Libya was preparing another “imminent” attack. Finally, the right of self-defence is subject to the requirement of proportionality, which left many commentators wondering whether it was proportional for the U.S. military to strike targets within Libya for its support of terrorism. At least one writer viewed the U.S. bombing of Libya as “part of crystallizing U.S. policy” that employed preemptive strikes against terrorism, although the opportunity to use this policy did not present itself until the end of the Cold War. (Maogoto, 2005: 93)

The domestic aspect of legality, i.e. did the President have the constitutional authority to use force against Libya, requires an evaluation of all the circumstances and the WPR. The application of force against Libya was a brief use of force that did not entail Congress declaring war on Libya, or the deployment of troops. In addition, the use of force was not strictly done under “emergency” conditions or for the purpose of rescuing American citizens held hostage. In his address to the country explaining the raid on Libya, Reagan

stated his actions were based on his "constitutional authority," including his powers as Commander-in-Chief. The WPR requires consultation with Congress about the deployment of troops and reporting, if the use of military force falls under section 4. Understandably, the Reagan administration avoided the reporting requirements of section 4 by claiming the use of force did not fall under section 4. Several members of Congress, mostly Democrats, were displeased that the "consultation" was in name only, because "Congressional leaders were called to the White House only as U.S. bombers were approaching Libya." (Fisher, 2004: 164) Instead of "consulting" with members of Congress, President Reagan was merely informing them of his decision to bomb Libya. If Congress disapproved of bombing Libya, it was far too late to stop it by the time the members were informed.

At the time of the bombing of Libya, the Democrats controlled the House of Representatives, which may partially explain why hearings were held on the issues involving war powers, Libya, and state-sponsored terrorism at the end of April 1986. The chairman of the House Committee on Foreign Affairs, Congressman Dante B. Fascell (Democrat from Florida), also wrote a letter to President Reagan, requesting compliance with the WPR. At the beginning of the hearings, Chairman Fascell stated, "there was no consultation, no report, and because of a dislike for the War Powers Resolution, which is still the law, we find Presidents, and not just this one, waltzing around in an attempt to avoid the requirements of the resolution." (Hearings, 1986: 2) He went on to ask, "Can the President, as Commander-in-Chief, take the country to war wherever an act of state-sponsored terrorism

has taken place, and do it all under the rubric of saying this is self-defense?" (Hearings, 1986: 4) However, despite the hearing and complaints from members, Congress did nothing more to compel the Reagan administration to comply with the WPR regarding the use of force in Libya. Thus, the bombing of Libya clearly conforms to the first two parts of the pattern identified by Koh of executive initiative and congressional acquiescence.

The Iran-Contra Affair

The Iran-Contra Affair was the Reagan administration's largest political scandal and tied two distinct issues, i.e. the release of hostages held in Lebanon, and the transfer of funds to the Contra militants in Nicaragua. It is connected to the Reagan administration's war on terrorism because some of the same executive branch officials who coordinated Reagan's WOT became involved in selling arms to Iran to facilitate the release of hostages held in Lebanon. One of the major players was Oliver North, a military aide to the NSC and advocate of using force to combat terrorism. In the mid-1980's, the Reagan administration was faced with the problem of how to free several hostages held by various groups in Lebanon in various locations. Frustration grew, as the U.S. was unable to negotiate for their release or mount a successful rescue mission because the intelligence on their location was too spotty. At the same time, President Reagan and many in his administration favoured giving aid to the Contras in Nicaragua as they fought the Sandinista government because Reagan did not want the Soviet Union and Cuba to gain a "toehold" in Central America. However, Congress did not agree with Reagan's position on Central America and cut off all funding for the Contras' military operations in a statutory provision known as the "Boland Amendment."

Despite the Boland Amendment, members of the executive branch sought funds from private sources and third countries to continue giving aid to the Contras. Moreover, the NSC staff agreed to an Israeli proposal that missiles be sold to Iran in return for the release of seven American hostages held in Lebanon.

President Reagan authorized Israel to proceed with the sale of arms to Iran in the summer of 1985, but did not notify Congress about this covert operation, despite section 501 of the National Security Act, which requires "significant anticipated intelligence activity" to be reported. The scandal broke in November 1986 when a Lebanese magazine reported the arms-for-hostages arrangement. Soon after, Oliver North and his secretary deliberately shredded pertinent documents; she achieved some fame when she told Congress later, "sometimes you have to go above the written law" during the hearings. Ronald Reagan admitted to the sale of weapons to Iran, but claimed it was not in exchange for hostages because the U.S. government "has a firm policy not to capitulate to terrorist demands." The attempt to sell weapons in exchange for the release of the hostages was not particularly successful as only three of 30 hostages were released. Under political pressure, Reagan established a commission, called the Tower Commission, to investigate; that commission subsequently found that the President should have had better control of the NSC staff, including North, Poindexter, and others. In addition, the Tower Commission stated that the Reagan administration showed "disdain for the law" but Reagan survived the scandal and, ultimately, his approval ratings recovered.

The Congress, controlled by the Democrats by 1987, established a joint House-Senate committee to investigate covert arms transactions with Iran and issued its report in November of that year. The majority report found that "the Iran-Contra Affair resulted from the failure of individuals to observe the law, not from deficiencies in existing law or in our system of governance." (Majority Report, 1987: 229) The minority report written by some Republicans, on the other hand, stated that the Reagan administration proceeded "legally in pursuing both its Contra policy and the Iran arms initiative." (Minority Report, 1987: 442) The perspective of the minority report was that the Congress should not have attempted to tie the President's hands in foreign relations by passing the Boland Amendment. According to the minority report, "much of what President Reagan did in his actions toward Nicaragua and Iran were constitutionally protected exercises of **inherent** Presidential powers." (Minority Report, 1987: 457)

The minority report of the Iran-Contra hearings might have been forgotten in time but one of its main proponents, Congressman Richard Cheney from Wyoming, became Vice President in the second Bush administration. As discussed in the Bush II chapters, Cheney and his aides borrowed from concepts devised in the Reagan administration and built upon theories of inherent presidential powers to erect a "New Paradigm" for the war on terror. These legal theories were then used to justify questionable presidential initiatives such as military commissions, "enhanced interrogation techniques," and warrantless surveillance. Savage recounted that when the *New York Times* reported the Bush II administration had violated the Foreign Intelligence Surveillance Act (FISA) of 1978 by authorizing the NSA to spy on

Americans' calls and emails without warrants, "Cheney told reporters that he believed the president had all the authority he needed to bypass the law based on his inherent powers as Commander-in-Chief." (Savage, 2007: 57) Cheney then told the reporters to read the minority report from the Iran-Contra hearings if they wanted to understand the principles he was operating under. (Ibid) Cheney did not address the problems of democratic accountability or bypassing the system of checks and balances when he announced his operating principles, nor was he ever forced to explain how the minority report from a previous scandal could yield guidelines for the Bush II administration.

In his book, *The National Security Constitution: Sharing Power after the Iran-Contra Affair*, Koh argued that Iran-Contra should not be viewed as an "aberration, an error on the part of certain individuals within a particular administration, but as a fundamental failure of the legal structure that regulates the relations among the president, Congress, and the courts in foreign affairs." (Koh, 1990: 3) His point was that unless new framework statutes were in place to ensure balanced institutional participation from all three branches of government in foreign policy making, scandals such as Iran-Contra would erupt again. In addition, Koh identified the pattern of executive initiative, congressional acquiescence, and judicial tolerance, which usually results in the executive branch "winning" any dispute with Congress over foreign relations. (Koh, 1990: 116) Building upon that foundation, this thesis attempts to illustrate how the combined circumstances of terrorist attacks and threats, provoking government responses, and counterterrorism with its need for secrecy and efficiency, exacerbate this tendency.

While researching this thesis, I was able to contact and interview two men with substantial ties to the Iran-Contra investigation. The first, Louis Fisher, was the research director for the majority staff on the House of Representatives Select Committee to investigate covert arms transactions with Iran; he later became the Senior Specialist at the Congressional Research Service. The other man, Bruce Fein, was the minority research director on the same committee and was also a Justice Department attorney in the Reagan administration. Fisher viewed the Iran-Contra affair as part of the pattern of executive branch intrusion on foreign affairs powers shared with Congress. (Fisher Interview) For Fein, the Iran-Contra affair was dissimilar to the Bush II administration's war on terror because, as he explained, the Reagan administration did not intend to alter the legal architecture with its counterterrorism policies. (Fein Interview) Another man on the minority staff, David Addington, later gained notoriety during the Bush II administration for his part in drafting the New Paradigm for the war on terror as Dick Cheney's lawyer. The perspectives and opinions of all three men appear in the Bush II administration chapters.

Lockerbie Bombing

The last major terrorist attack during the Reagan administration was the explosion of Pan Am flight 103 over Lockerbie on December 21, 1988. All 259 people on board were killed, along with 11 people on the ground. Ronald Reagan's Vice President, George H. W. Bush, had already been elected President in the November elections and Reagan left office less than one month later on January 20, 1989. Reagan did not take "swift and effective retribution" against the terrorists who were responsible for Lockerbie, and it is

unclear exactly why. Some historians believe Reagan expected George H. W. Bush, the next President, to respond appropriately to the Lockerbie attack. Others note that, immediately after Lockerbie, a group called the "Guardians of the Islamic Revolution" claimed responsibility for the bombing because of their anger at the U.S. for giving refuge to the shah, and for the July 1988 downing of an Iranian civilian aircraft by the USS *Vincennes*. (Winkler, 2006: 68) Thus, it was not certain which group or state was behind the Lockerbie bombing prior to Reagan's departure. As discussed in the chapter on George H. W. Bush, the U.S. and U.K. eventually decided, "to treat the bombing of Pan Am 103 as a crime under their domestic legal processes and for which Libya bore state responsibility under international law." (Schwartz, 2007: 556)

Conclusion

An assessment of Reagan's war against terrorism and the later "war on terrorism" launched by President George W. Bush after 9/11 will be part of later chapters. In brief, there are striking similarities in style and language. For example, both administrations referred to terrorists and those who helped them as "evil" and the personal contempt Reagan showed for Qaddafi was similar to Bush's evident personal contempt for Osama bin Laden and Saddam Hussein. Even the concept of conducting a "war" on terror or against terrorism with the resulting military language, rhetoric, and analogies is similar. Indeed, one scholar noted, "the discourse on the 'War on Terror' follows long-established interpretive tendencies; the tendency to militarise foreign policy responses, a fear of internal subversion, a sense of endangerment towards 'the other' and the demonising of opponents." (Jackson, 2005: 156) Winkler analyzed Reagan's use of the "terrorist label" and explained how this meant

individual terrorists “were no longer just the responsibility of law enforcement; heads of all states now had an obligation to respond and prevent such acts within their spheres of influence. American presidents could use the full range of state powers, including preemptive military strikes and violations of historically recognized boundaries of state sovereignty, in their pursuit of terrorists.” (Winkler, 2006: 95)

Both the Reagan administration and second Bush administration emphasized the use of military force to combat terrorism, with both administrations offering legal justifications for using force in circumstances which other states questioned. Both administrations espoused broad views of the right of self-defence under Article 51, arguing that it permitted the U.S. to defend itself after “armed attacks” by terrorists. Self-defence included intercepting the plane with the *Achille Lauro* hijackers, launching air strikes on Libya, and, in the Bush II administration, invading Afghanistan and Iraq. Furthermore, Presidents Reagan and George W. Bush claimed inherent presidential powers to conduct foreign relations, including counterterrorist activities without significant input from Congress. Both administrations contained officials who believed terrorism is more like warfare than criminal activity and therefore, the methods of fighting it need to be more aggressive and proactive than the usual law enforcement regulations. According to this view of terrorism, law enforcement looks backward to punish behaviour whereas a war paradigm is more proactive in deterring future acts of terrorism.

Ironically, despite its rhetoric about swift and effective retribution for acts of terrorism, the Reagan administration only reacted twice in a manner

that matched this rhetoric: when the *Achille Lauro* hijackers were captured, and when the U.S. bombed Libya in response to Qaddafi's support of terrorism. The reasons for the wide discrepancy between Reagan's professed policy of swift and effective retribution and its non-implementation in most cases was attributed to Reagan's management style which allowed subordinates to take action (or block action) on their own, and different factions within the administration who could not agree on the desirability of using military force for counterterrorism operations. (Wills, 2003: 214) External factors such as the Cold War rivalry with the Soviet Union and Reagan administration officials' propensity to view geopolitical problems through an East-West prism may have also constrained the Reagan administration in its uses of force for counterterrorism. However, the Reagan administration was not constrained by the international law norms of self-defence under Article 51, or by the WPR requirements about consulting and reporting to Congress. Later chapters on the second Bush administration will further develop how theories and concepts from previous administrations, particularly from the Reagan administration, were adapted for use in the post 9/11 war on terror.

Chapter 5
The Administration of George H.W. Bush

The first George Bush to become President was born in 1924 and was a naval aviator during World War II. Of the four Presidents in this thesis, George H.W. Bush is the only combat veteran, and the only one term president. He also held several political posts prior to his election as President, including Vice President under Ronald Reagan. In 1988 George Bush defeated the Democratic candidate, Michael Dukakis, with 53.4% of the popular vote and became the first sitting Vice President to be elected President since 1836. Reagan's popularity as President no doubt contributed to George H. W. Bush's election, despite the Iran-Contra scandal. The first Bush Administration (or "Bush I") was frequently described as pursuing a "pragmatic" and "prudent" foreign policy in contrast to the ostensibly more ideological Reagan administration, which emphasized a more strident approach to the Soviet Union. (McCormick, 2005: 157)

Bush came into office uniquely suited to the tasks of conducting American foreign policy and combating terrorism in the sense that his previous experience was often directly relevant. For example, Bush had served as Director of the CIA so he was intimately acquainted with covert operations and the problems they incurred; he was the only U.S. President who had been a member of the intelligence community. Bush had also been the U.S. Ambassador to the UN so he realized the value of multilateralism and the need to accommodate international opinion. As Vice President under Reagan, he chaired the Task Force on combating terrorism that Reagan established in 1985; this task force evaluated American policy and programs

regarding terrorism after the spike in terrorist attacks in the 1980's. His predecessor, Reagan, and his successor, Bill Clinton, were former state governors who came to the White House without Bush's level of international, diplomatic, and pragmatic terrorism expertise.

Key Bush I players were the two Secretaries of State, James Baker (1989-1992) and Lawrence Eagleburger (1992-1993), Secretary of Defense Richard Cheney, and the NSC Advisor Brent Scowcroft, who served previously in this capacity in President Gerald Ford's administration (1975-1977). The first Director of the CIA in the Bush I administration was William Webster (1987-1991) and the second was Robert Gates who served from 1991 until 1993. Another notable foreign policy participant was the Chairman of the Joint Chiefs of Staff, Colin Powell. As explained later, many of these men went on to serve in the administration of George W. Bush.

As depicted on the chart in chapter 3 on party affiliations, Bush, a Republican, dealt with a Congress that was controlled by the Democrats for all of his four years in office. The Chairman of the House Foreign Affairs Committee, a Democrat from Florida, Dante Fascell, was a cosponsor of the War Powers Resolution (WPR) in 1973. In the Senate, the Chairman of the Foreign Relations Committee was Democrat Claiborne Pell of Rhode Island. This type of "divided government" where one party controls the White House and the other party controls one or both houses of Congress normally forces the political parties to forgo extreme ideological positions in the interests of getting legislation passed. Conventional wisdom also indicates that the political realities of divided government tend to result in pragmatic comprises

between the legislature and President. One theory is that by putting one party in the White House and the other party in control of Congress, the American voters are adding "political checks and balances to the structural checks and balances" contained in the U.S. Constitution. (Schlesinger, 1998: 464)

Foreign Policy

The Bush I administration dealt with a number of unexpected foreign policy challenges including the end of the Cold War, the break up of Yugoslavia, the dissolution of the Soviet Union in December 1991, and the Iraqi invasion of Kuwait in August 1990. Furthermore, the Soviet army left Afghanistan after ten years of fighting in February 1989, one month after Bush took the oath of office as President. The old East-West tensions that characterized and dominated foreign relations between the U.S. and the rest of the world faded with the end of the Cold War, and President George H. W. Bush proclaimed a "new world order" where the norms of the UN Charter would be respected and enforced through multilateral action. However, this hopeful vision of international politics was tested by events such as the Iraqi invasion of Kuwait.

The first Gulf War was not a counterterrorist use of force or labelled a "war on terror" by the American government. Instead, the first Bush administration argued that Saddam Hussein's invasion of Kuwait in August 1990 could not "stand" because it was a direct challenge to the international community and the norms of international law. The terminology and rhetoric of terrorism eventually appeared in some of President George H. W. Bush's

speeches on the Iraqi invasion, however, and gradually the administration began referring to Saddam Hussein as an “international terrorist” because the Iraqi military held several American and Western hostages in Iraq and Kuwait. Throughout the autumn of 1990, the first Bush administration increased its rhetorical campaign against Saddam Hussein by emphasizing the hostages and the “acts of terror” perpetrated on the people of Kuwait by the Iraqi military. Eventually, the Bush I administration’s framing of the invasion of Kuwait, “transformed the crisis in the Persian Gulf from a conventional war scenario between two foreign nation-states into an international battle against the scourge of terrorism.” (Winkler, 2006: 104) In addition, the first Bush administration skilfully ascribed “many of the negative characteristics ascribed to the Communists in the Cold War narrative” to Iraq, thus making it imperative to resist Iraqi aggression in Kuwait. (Winkler, 2006: 107)

The relatively brief ground war in the first Gulf War, which resulted in the Iraqi evacuation of Kuwait, coupled with the low number of American casualties, appeared at first to be a triumph for President George H. W. Bush. The victory was hailed as vindication of the new world order where multilateral institutions would enforce international legal norms. Bush and his National Security Advisor, Brent Scowcroft, explained later that the U.S. military did not enter Iraq in 1991 to pursue Saddam Hussein because it would have exceeded the UN mandate, destroyed the coalition, and forced the U.S. to occupy Baghdad and rule Iraq. (Bush and Scowcroft, 1998: 489) In addition, they wrote, “we had been self-consciously trying to set a pattern for handling aggression in the post---Cold War world. Going in and occupying Iraq, thus unilaterally exceeding the United Nations’ mandate, would have destroyed the

precedent of international response to aggression that we hoped to establish." (Ibid) Ironically, the second Bush administration also self-consciously tried to set a pattern for handling terrorist aggression, but as detailed in later chapters, it was a pattern of preemptive military action instead of the "international response" advocated by the first Bush administration.

Counterterrorism Policy in the Bush I Administration

When George H. W. Bush became President in January 1989, the U.S. government began applying a "more low-keyed approach to terrorism" because the "practical results of the aggressive, proactive approach to counterterrorism. . . tempered enthusiasm for it." (Tucker, 1997: 47) In other words, the Reagan administration's war against terrorism was not viewed as a resounding success. In addition, Bush "inherited a counterterrorism program whose policies, organization, and methods were much as his task force recommended they be." (Tucker, 1997: 46) As noted in the Reagan chapter, Vice President Bush was chairman of the Task Force on Combating Terrorism created by Reagan in 1985. This gave Bush unusual expertise and experience regarding the American government's counterterrorism procedures and policies. In addition, it also gave him the opportunity to influence counterterrorism methods prior to becoming President. No other President in this study had comparable experience.

The official report of the Vice President's Task Force was a result of political pressure on the Reagan administration to do something after several spectacular terrorist attacks in 1985. Specifically, the most serious attacks

involving Americans that year were the hijacking of TWA flight 847 in June, the hijacking of the cruise ship *Achille Lauro* in October, and the December shootings at the Rome and Vienna airports. According to the report, in 1985 there were 23 Americans killed and 160 wounded as a result of international terrorism. Reagan wanted the task force to "review the nation's program to combat terrorism" and "to reassess U.S. priorities and policies, to ensure that current programs make the best use of available assets, and to determine if our national program is properly coordinated to achieve the most effective results." In addition to the chairman, George H. W. Bush, other participants included retired admiral James Holloway as the executive director and representatives from the Departments of State, Defense, Transportation, Justice and the Treasury along with staff from the CIA, FBI, and NSC.

The conclusions and recommendations of the task force were released in February 1986. The recommendations were divided into the following five categories:

- National policy and program recommendations
- International cooperation recommendations
- Intelligence recommendations
- Legislative recommendations
- Communications recommendations

From the perspective of using force to combat terrorism, one of the most interesting findings was the recommendation to prepare and submit to the NSC "policy criteria for deciding when, if, and how to use force to preempt, react and retaliate." (Task Force, 1987: 28) Criteria for developing response

options included the potential for injury to innocent victims; status of forces for preemption, reaction or retaliation; ability to identify the target; and host country and international cooperation or opposition. Two months after the public release of the task force report, the Reagan administration used force against terrorism when it bombed Libya in April 1986. There is no evidence that George H. W. Bush opposed bombing Libya or that he questioned the efficacy of using force to prevent international terrorism.

Another noteworthy finding from the Task Force report for the purposes of this study was a legislative recommendation to "study the relationship between terrorism and the domestic and international legal system." (Task Force, 1987: 34) The recommendation elaborated on this theme, explaining, "There were ambiguities concerning the circumstances under which military force is appropriate in dealing with terrorism." This "lack of clarity" could "limit the power of governments to act quickly and forcefully." The task force then suggested "private and academic study to determine how international law might be used to hasten, rather than hamper, efforts to respond to an act of terrorism." This recommendation is similar to sentiments expressed by Reagan's legal advisor at the State Department, Abraham D. Sofaer, about how international law blundered in addressing the problems of international terrorism.

In the late 1980's, Sofaer wrote and lectured about the failure of international law to effectively repress international terrorism. In fact, Sofaer wrote that, "international law is too often used to serve terrorists and their objectives." (Sofaer, 1989: 90) He was critical of legal concepts that could

impose “limits on strategic flexibility” such as the doctrine of self-defence as discussed by the International Court of Justice in the case brought by Nicaragua against the U.S. in 1986. In that case, the ICJ found that the U.S. had violated the UN Charter by mining the harbours of Nicaragua and by providing arms and training to the Contras. The ICJ stated that self-defence under article 51 did not apply to American activities in Nicaragua because Nicaragua’s incursions into El Salvador and its assistance to insurgents in that country did not constitute an “armed attack” as used in the UN Charter. Not surprisingly, many members of the Reagan administration were critical of this decision, believing that it was unduly restrictive regarding a state’s right to self-defence. Sofaer summed up their strategic thinking on terrorism when he wrote, “to deal effectively with state-sponsored terrorism requires treating its proponents not merely as criminals, but as a threat to our national security.” (Ibid) According to Sofaer, this was the policy of the U.S. during the Reagan administration and it was supported by the Vice President’s task force.

Sofaer’s analysis illustrates the tendency of members of the Reagan and Bush I administrations to categorize international terrorism as not “merely” criminal, but as a national security threat. According to this line of thinking, if international terrorism is truly a national security threat, then deployment of military force to protect the nation is warranted and completely lawful. On the other hand, if an administration views the problem as criminal activity, then that administration is more likely to pursue law enforcement methods to capture and convict the terrorists.

As explained in the literature review chapter, divergent schools of thought regarding the utility of using force against terrorism existed before the second Bush administration used military force after the 9/11 attacks. The crime versus war dichotomy was part of all four administrations and its ramifications gradually increased in influence. Abraham Sofaer and like-minded individuals such as George Shultz (Secretary of State from 1982 to 1989) advocated proactive measures against state sponsors of terrorism and terrorists involving the preemptive use of military force. (Sofaer, 1986 and Sofaer, 1989) On the other hand, many other academics like Paul Wilkinson warned liberal democracies should avoid a "total militarization of Western response" to terrorism because it would "encourage the very anarchy in which terrorism flourishes." (Wilkinson, 1986: 299). The evidence suggests that the first Bush administration included many adherents to the view that acts of international terrorism were similar to acts of war, yet that administration did not use force against international terrorism, a paradox that is examined in following sections of this chapter.

Lockerbie Bombing

The most infamous terrorist incident of the Bush I administration involving Americans occurred shortly before George H. W. Bush took office. On December 21, 1988 after Bush defeated Dukakis but before he took the oath of office, Pan Am Flight 103 exploded over Lockerbie, Scotland. All 259 people on board the plane were killed along with 11 people on the ground when the airplane crashed. American citizens accounted for 189 of those killed. The burning wreckage of the plane and the resulting devastation on the

ground in Scotland were broadcast immediately to the American public and all around the world. The Reagan administration, which had promised “swift and effective retribution” against terrorism, did not respond to the Lockerbie bombing, leaving that to the incoming administration of George H. W. Bush. Two days after the explosion, President Reagan expressed his sorrow about Pan Am 103 but did not mention terrorism. He took no retaliatory action, partially due to the controversy over who was responsible for bombing Pan Am 103.

Initially, investigators looking into the Lockerbie tragedy suspected that Iran was involved due to the accidental shooting down of an Iranian civilian aircraft a few months earlier on July 3, 1988. A US Navy ship, the *Vincennes*, fired two missiles at Iran Air Flight 655 after erroneously identifying the plane as a military fighter. All 290 passengers on board were killed and the U.S. government later paid 131.8 million dollars to Iran in a settlement. But shortly after the tragedy, the Iranian government offered a reward of 10 million to any one who avenged the destruction of the airplane and it appeared that a radical Palestinian group called the Popular Front for the Liberation of Palestine-General Command might have taken up the offer. However, in November 1991 both the UK and U.S. issued parallel indictments against two **Libyans** (Abdelbaset Ali Mohmed al-Megrahi and Al Amin Khalifa Fhimah) who were allegedly Libyan intelligence agents involved in the Lockerbie bombing.

Libya refused to extradite the two men accused of placing an IED (improvised explosive device) on Pan Am 103, but after several years of UN sanctions, the Libyan government relented and the Lockerbie suspects were

flown to the Netherlands. Colonel Gaddafi agreed to a trial governed by Scots law in the Netherlands; this began on May 3, 2000, more than 10 years after the explosion. On January 31, 2001, al-Megrahi was found guilty while his co-accused, Fhimah, was found not guilty and permitted to return to Libya. The Libyan government always claimed al-Megrahi was innocent, although Libya paid 2.7 billion dollars in compensation to the victims' families. Al-Megrahi appealed his conviction but this was unsuccessful in 2002; subsequently, al-Megrahi lodged another appeal against his conviction with the Scottish Criminal Cases Review Commission. Before that was adjudicated, al-Megrahi was released by the Scottish Government on compassionate grounds due to a diagnosis of prostate cancer. In August 2009, he flew to Libya after having served eight and a half years of his life sentence. Although al-Megrahi was given only a few months to live according to his doctors, he survived until May 20, 2012, living in Tripoli. The U.S. government and some victims' families were outraged by this result. In the end, the Lockerbie trial did not settle unanswered questions surrounding the explosion, such as whether Libya was really responsible or a convenient suspect, and whether the evidence of al-Megrahi's guilt was contaminated by American or British authorities. Furthermore, even if al-Megrahi was correctly convicted, he must have had assistance in bombing Pan Am 103 but the source of this assistance remains unknown.

The Aftermath of Lockerbie

For the purposes of this study, the Lockerbie aftermath is instructive because of what did not occur; specifically, neither Reagan nor Bush used

military force against Libya for the Lockerbie bombing. Instead, the response was a criminal investigation, followed eventually by UN sanctions against Libya and indictments of the accused and a trial. According to Tucker, this was a "forensic and judicial rather than political and military" response to a major terrorist attack. (Tucker, 1997: 46) In addition, Tucker cites interviews with NSC and FBI officials in 1993 as proof that the Lockerbie investigation revealed a "judicial response to terrorism" was "effective and useful." (Ibid) Schwartz noted that the U.S. and UK could have treated the Lockerbie bombing as an "act of war" but instead decided to treat it as a **crime** under their domestic legal processes. (Schwartz, 2007: 556) Together these two countries investigated the crime scene in Scotland and eventually issued parallel indictments against the two Libyan suspects.

It is difficult to pinpoint exactly why the first Bush administration did not use force in response to the Lockerbie tragedy. Close examination of contemporary accounts and analysis of the Lockerbie investigation indicate that there are several possible explanations. Firstly, the initial gathering of evidence and recreation of the bombing took more than three years, and many other international crises erupted in this time, forcing the first Bush administration to concentrate on other foreign policy problems. In addition, the 1986 air strikes in Libya ordered by Reagan prompted a harsh international reaction and did not appear to have the desired effect of deterring further Libyan acts of terrorism. Indeed, Colonel Qaddafi may have responded to the 1986 air strikes with plans for bombing an American civilian aircraft. Furthermore, the Bush I administration had to cooperate with the British government regarding the Lockerbie investigation due to the location of

the attack, and this may have limited their options concerning response. Finally, it is possible that George H. W. Bush's rhetoric about a new world order of multilateral cooperation was based on his sincerely held beliefs that the post-Cold War world could be governed more by international law norms and less by brute force.

The eventual trial of the Lockerbie accused took more than a decade and the conviction of one of them occurred after George H. W. Bush left office. Indeed, by the time al-Megrahi was convicted, the second George Bush was in the White House. During the Bush I administration, when Iran appeared as the main suspect in the bombing, many of the victims' families formed support groups and pressured President Bush to find answers. As a result, Bush issued an executive order on August 4, 1989 establishing a commission. The President's Commission on Aviation Security and Terrorism consisted of seven members, four of whom were appointed from Congress: Senator Frank Lautenberg (Democrat from New Jersey), Senator Alfonse D'Amato (Republican from New York), Representative James Oberstar (Democrat from Minnesota), and Representative John Hammerschmidt (Republican from Arkansas). In May 1990, the Commission released a 182-page report that included recommendations designed to improve aviation security and the ability of the government to respond to terrorist acts like Pan Am 103.

The commission found that the destruction of Pan Am 103 might have been prevented and criticized Pan Am's security lapses and the failure of the FAA (Federal Aviation Administration) to enforce its own regulations. It also discussed contentious issues like public notification of aviation threats and the

ability of the U.S. State Department to assist victims' families after a major terrorist attack overseas. Most relevant for this study is chapter 8 of the commission's report entitled "National Will."

According to newspaper accounts at the time, many of the commission's findings were expected, but some sections of chapter 8 came as a surprise due to the characterizations and findings on terrorism. In this chapter, the commission articulates "several facts about terrorism" which include the following:

- "Unchecked terrorism creates a shift in the balance of power toward those nations that sanction terrorism and use it as an instrument of foreign policy."
- "Terrorism is a form of surrogate warfare."
- "Acts of state-sponsored terrorism against a nation's citizens are acts of aggression against that nation. In today's world, the principal targets are the values and interests of democratic nations." (President's Commission, 1990: 113)

The commission went on in chapter 8 to recommend "zero tolerance" towards terrorist attacks and then wrote, "Pursuing terrorists and responding swiftly and proportionately to their acts" must be U.S. policy "in deed as well as in word." (President's Commission, 1990: 115) In addition, the commission advocated "planning, training and equipping for direct preemptive or retaliatory military actions against known terrorist hideouts in countries that sanction them." (Ibid) This strong language would become frequent in rhetoric

after the 9/11 attacks, but it was not commonplace during the first Bush administration.

Chapter 8 on “National Will” also urged the U.S. to exercise its “national will” and take “more aggressive action against both terrorists and their state sponsors.” (President’s Commission, 1990: 113) The benefits of taking a law enforcement approach to the problem of terrorism were acknowledged, but the commission nevertheless continued to assert that this approach was not always appropriate. The “reactive” and “time-consuming process” of the law enforcement approach required the U.S. government to develop “active measures--preemptive or retaliatory, direct or covert” in the effort to deter and prevent terrorism. (President’s Commission, 1990: 117) If George H. W. Bush had ordered a military strike in retaliation for the bombing of Pan Am 103, he surely would have cited the language in chapter 8 of the commission’s report as justification.

However, according to Gerson and Adler, a military strike against Libya “never came under serious consideration” and this was the result of “a personal decision made by George Bush.” (Gerson and Adler, 2001: 98) Two powerful bureaucracies agreed with this decision: the Justice Department because it wanted to prosecute the two indicted Libyans, and the Pentagon because the top military leaders believed that using force should be limited to situations that complied with the “Powell Doctrine,” which established strict conditions for the deployment of American military force. According to Gerson and Adler, the U.S. military in the early 1990’s did not include abstractions such as “justice” or “teaching terrorists a lesson” as part of America’s vital

national interests warranting the deployment of military force. (Gerson and Adler, 2001: 99) A decade later, under Secretary Donald Rumsfeld, the U.S. military reoriented its position to embark on the "war on terror" after 9/11.

Another consequence of the Lockerbie bombing was that Congress passed legislation in the autumn of 1990 after lobbying by the victims' families. Senator Lautenberg, a member of the President's Commission on Aviation Security and Terrorism, introduced bills that were based on the Commission's recommendations. The Aviation Security Act had wide bipartisan support but still had trouble passing through Congress because a Republican from a Western state put a secret "hold" on the legislation to get a piece of unrelated legislation included. It took strenuous lobbying by the victims' families and the joint support of Senator Dole (a Republican) and Senator Mitchell (a Democrat) to get the legislation passed. (Gerson and Adler, 2001: 96)

UTA Flight 772

In a tragedy very similar to Lockerbie, a French airplane exploded over the Sahara Desert on September 19, 1989 killing all 170 aboard, including seven Americans. UTA Flight 772 has been called the "forgotten flight" because, despite the parallels to Lockerbie, much less was written about it. This is true even though one of the victims, Bonnie Pugh, was the wife of the U.S. ambassador to Chad. Subsequent investigations revealed that an IED was placed in the forward cargo hold inside luggage loaded at Brazzaville airport in the Republic of Congo. Islamic jihadists claimed credit for the

bombing, in retaliation for Israel's kidnapping of Hezbollah leader Sheikh Abdel Karim Obeid.

Ten years later, in 1999, six Libyans were tried in absentia in Paris and convicted of the bombing. In 2003, Libya "accepted responsibility for the actions of its officials" and arranged for compensation payments of $170 million for the victims. The American victims' families refused these compensation awards and instead filed a lawsuit against the Libyan government in federal court in Washington. The second Bush administration took Libya off the "state sponsor of terrorism list" in 2006 and began diplomatic talks with the Libyan government, an unimaginable move a few years earlier. In 2007, the federal judge found Libya directly responsible for the bombing of UTA 772 and in 2008, the American families won $6 billion in damages, which Libya appealed. The aftermath of the bombing of UTA 772, like the aftermath of Lockerbie, resulted in a judicial response despite the existence of strong rhetoric about taking "proactive measures" found in chapter 8 of the President's Commission on Aviation Security and Terrorism report. As discussed above, the language in chapter 8 justified aggressive action against state sponsors of terrorism. The absence of resorting to the use of force may indicate that the Bush I administration had learned, like the Reagan administration before it, that it was easier to issue strong rhetoric about terrorism than follow through with effective, aggressive measures using force.

Unanswered policy questions regarding terrorism remain regarding the Lockerbie and UTA 772 explosions. For example, what policy, if any,

deters a state sponsor of terrorism? Should a superpower such as the U.S. be satisfied with the convictions of Libyan citizens for their participation in acts of international terrorism, or is some show of force required to discourage other states from sponsoring these activities? From the perspective of preventing further acts of aviation terrorism, is it more effective to treat the bombing of civilian aircraft as a crime, or as an "act of war" which threatens national security?

Conclusion

Characterizing the first Bush administration's operative policy on counterterrorism is elusive for several reasons including the simple fact that the first President Bush was in office for a mere four years and these years were dominated by two major foreign policy challenges: the Iraqi invasion of Kuwait in 1990 and the end of the Cold War. George H. W. Bush has been praised for his leadership and skill in handling both of these difficult issues. Specifically, his ability to maintain an international coalition, work with the UN, expel Saddam Hussein's army from Kuwait, and navigate the end of the Cold War are cited as his most important foreign policy successes. As Carter's national security advisor noted, the first George Bush left office with "unprecedented global respect." (Brzezinski, 2007: 82)

During the first Bush administration, fewer acts of highly visible international terrorism combined with the administration's concentration on the invasion of Kuwait and the enormous changes happening in Europe meant that the prevention of terrorism naturally became less urgent. In 1990, a year

after the Lockerbie and UTA 772 bombings, the National Security Strategy briefly mentions terrorism under the heading “Low Intensity Conflict.” It notes that Special Operations Forces have “particular utility in this environment,” but does not detail the guidelines for using force against terrorism. (National Security Strategy, 1990: 28)

The nature of international terrorism was slowly changing during the 1990’s, although this was not obvious to most casual observers. Under Reagan and George H. W. Bush, counterterrorist officials often wrote about the dangers of state-sponsored terrorism that was difficult to deter. What was emerging in the 1990’s was another form of terrorism: loose, independent, ad hoc groups such as al Qaeda, motivated by religious fundamentalism. Until the first World Trade Center bombing in 1993, these transnational groups did not appear to have the ability to commit terrorist acts on American soil. The Reagan administration tended to view international terrorism through the prism of the Cold War and to focus on state-sponsored terrorism, a trend that continued in the Bush I administration. However, the end of the Cold War and the dulling of tensions between the U.S. and Russia did not mean the end of terrorist attacks.

President George H. W. Bush, familiar with intelligence reports from his days as CIA director, seems to have underestimated the ability of Islamic fundamentalists to inflict serious harm on the U.S. For example, after the Soviet army left Afghanistan in 1989, the Bush administration, preoccupied with German reunification, the disintegration of the USSR, and the first Gulf War, disengaged from the struggles going on in Afghanistan for control of the

government. (Coll, 2004: 217) The power vacuum left bin Laden and the jihadists free to help the Taliban establish a fundamentalist regime in Kabul. The jihadists would eventually establish terrorist training camps in Afghanistan where both practical skills and al Qaeda's ideology were taught. President Bush was so consumed by other priorities in the early 1990's that, referring to fighting in Afghanistan, he once asked, "Is that thing still going on?" (Coll, 2004: 228)

After his defeat to Bill Clinton in November 1992, President Bush gave a speech at West Point in which he articulated his general principles for the use of force. These included resorting to military force "when force can be effective, where no other policies are likely to prove effective, where its application can be limited in scope and time, and where the potential benefits justify the potential costs and sacrifice." (Bush, 1993) He continued with this analysis, "Military force is never a tool to be used lightly or universally. In some circumstances, it may be essential, in others counterproductive. I know that many people would like to find some formula, some easy formula to apply, to tell us with precision when and where to intervene with force. Anyone looking for scientific certitude is in for a disappointment." (Ibid) Bush did not mention the circumstances justifying using force against terrorism in this address.

An assessment of the Bush I administration's guidelines for using force against terrorism is complicated by the fact that they were never plainly articulated and must therefore be gleaned from various sources. These include the Task Force Report on Terrorism written when Bush was Reagan's

vice president, the President's Commission on Aviation Security and Terrorism convened after Lockerbie, and miscellaneous sources. A review of these materials suggests a paradox in that while the first President Bush supported a proactive, aggressive stance against international terrorism, when presented with opportunities to use force against terrorism (for example, after the bombings of Pan Am 103 or UTA 772), he did not.

Chapter 6
The Administration of Bill Clinton

William Clinton, or simply "Bill Clinton," is the only Democrat in this research project, presenting the possibility that his uses of force against terrorism deviate from the pattern of the previous two Republican presidents due to political party affiliation. He narrowly defeated George H. W. Bush in 1992 with just 43% of the popular vote; the election was largely a result of public disillusionment with the first Bush administration's handling of the economy. Clinton was elected for two terms in office (8 years), something no Democrat had done since Franklin Roosevelt in the 1930's. The Democrats controlled both houses of Congress when Clinton was first elected, but this abruptly changed with the mid-term elections of 1994. As illustrated by the party affiliation chart in chapter 3, both houses of Congress were led by Republicans beginning in January 1995. After that, Clinton had to deal with an assertive Republican Congress led by the Speaker of the House, Newt Gingrich, and the Senate Majority Leader, Bob Dole. In theory, a Congress controlled by the Republicans might be expected to inhibit a Democratic president's use of force, but this did not appear to happen in practice, as the following illustrates.

In addition, Bill Clinton became the only president impeached in the 20th century; the only other president impeached was Andrew Johnson in 1868. While one might expect Clinton to be an exception to Koh's pattern of executive initiative, congressional acquiescence, and judicial tolerance, the evidence regarding his use of force against terrorism indicates that he followed the same pattern. As the only Democrat in this thesis, Clinton's

foreign policy could have been a radical change from his Republican predecessor, George H. W. Bush, but this was not the case. In general, the Clinton administration began with a commitment to a "foreign policy rooted in a clear set of principles," instead of the "ad hoc" foreign policy of the preceding Bush administration. (McCormick, 2005: 178)

President Clinton's first Secretary of State was Warren Christopher (1993-1997), often described as a low-key advisor. The second, more visible Secretary of State was the first woman in this position, Madeleine Albright (1997-2001). There were three Secretaries of Defense during the Clinton administration: Les Aspin (1993-1994), William Perry (1994-1997), and William Cohen (1997-2001). Anthony Lake was Clinton's first National Security Advisor (1993-1997) and Sandy Berger was the second (1997-2001). Clinton's CIA directors were R. James Woolsey (1993-1995), John Deutch (1995-1996) and George Tenet (1997-2004). The FBI director during the Clinton administration was Louis Freeh, a man chosen and appointed by Clinton in 1993, but ultimately at odds with many members of the Clinton administration. Freeh served as FBI director until June 2001, leaving shortly before the 9/11 tragedy and two years before the end of his statutory term. In his book, *My FBI: Bringing down the MAFIA, investigating Bill Clinton, and Fighting the War on Terror*, Freeh asserted that under his leadership, the FBI did all that it could to stop al Qaeda, an assertion disputed by many. (Freeh, 2005)

Clinton's Foreign Policy

Unlike his predecessor George H. W. Bush, Clinton, a governor from the state of Arkansas, was not deeply steeped in foreign policy expertise when he was elected. In fact, Clinton was mainly focused on his domestic agenda and the American economy when he arrived at the White House in 1993, as the campaign slogan "it's the economy, stupid" bluntly reflected the public's concerns. Eventually foreign policy challenges forced his administration to devote more time and energy to the international community. The disintegration of Yugoslavia in the 1990's, for example, required the administration to develop a strategy, along with the Europeans, for dealing with the associated problems and violence in Bosnia, Croatia, and Serbia. When Clinton took the oath of office, the Cold War was over and the "new world order" which the former president (George H. W. Bush) envisaged, seemed possible; the rivalry between the world's superpowers no longer influenced every regional problem. Clinton advocated promoting democracy as an alternative to the containment strategy, which prevailed during the Cold War. In 1994, his national security paper entitled *A Strategy for Engagement and Enlargement* listed three pillars of US strategy: American retention of global military predominance, the search for continued economic prosperity and expanded free markets abroad, and the promotion of democracy around the globe.

During his eight years of office, Bill Clinton submitted 60 war powers letters and reports to the Congress in compliance with the War Powers Resolution ("WPR"). Many of these letters involve the deployment of U.S.

military forces to Bosnia, Kosovo, East Timor, and Haiti; the relevant letters for the purposes of this study are the ones regarding Iraq, Somalia, Afghanistan, and Sudan. The War Powers Resolution was enacted in 1973 despite the veto of President Nixon, as a reaction to the Vietnam War. As discussed in chapter 3, it was intended to restore the balance between the legislative and executive branches of government regarding the decision to send U.S. military forces into hostilities by limiting the president's "authority to use armed forces abroad in hostilities or potential hostilities without a declaration of war or other congressional authorization." (Grimmett, 2007:1) Its operation has always been controversial; every president since its passage has questioned its constitutionality and many scholars argue that it should be repealed either because it usurps executive power or because it is ineffective in restoring Congress' role in determining when military force should be introduced into hostilities.

The WPR does not specifically mention the constitutional responsibilities of either the Congress or the president when responding to terrorist acts. However, the president is granted the power to use force when there is a declaration of war made by Congress, specific statutory authorization, or a "national emergency created by attack upon the United States, its territories or possessions, or its armed forces." (War Powers Resolution, 1973: section 2). A large terrorist attack upon the U.S. would permit the President to respond with an immediate military response but the President is still required to "consult" with Congress in every possible instance. (Hendrickson, 2002: 99) Much controversy has resulted from the many definitions of "consultation"; proponents of the executive branch initiative

argue that simply telling Congress the facts about a military response is sufficient while members of Congress claim that "consultation" was intended to encompass more than "merely being informed." (Grimmett, 2007: 2) The U.S. Supreme Court has never been asked to decide upon the precise definition of "consultation" under the WPR.

Counterterrorism Policy during the Clinton Administration

In general, the Clinton administration viewed the containment of international terrorism as a law enforcement matter, in contrast to the "war against terrorism" approach of the Reagan administration. According to Feste, Clinton pursued a conflict avoidance strategy when responding to international terrorism, with the result being mostly "unilateral, defensive actions, apart from the retaliatory, brief attacks against al Qaeda targets in Afghanistan and Sudan" (Feste, 2011: 181). Moreover, the Clinton administration did not employ the war-like rhetoric of previous administrations to illustrate its concern about international terrorism; rather, it increased funding for counterterrorism programs. According to a former director and senior director for counterterrorism at the National Security Council during the 1990's, by 1996 Clinton was steadily allocating more of the federal budget to terrorism. (Benjamin and Simon, 2003: 247) Funding for counterterrorism, which is difficult to quantify as the amount allocated to the CIA is classified, increased steadily from 1996 to the end of Clinton's term in 2001.

The State Department under Clinton articulated four ways in which the US dealt with terrorists: by providing "no concessions" to terrorists; by using

the legal system to try and convict those who engaged in or supporting terrorist activities; by trying to “isolate” and “change the behavior” of terrorists; and by coordinating counterterrorist efforts with other countries. (Hendrickson, 2002: 101)

According to Madeleine Albright, Clinton used the “bully pulpit” of the White House to “heighten awareness of the terrorist threat and rouse global support for defeating it” (Albright, 2003: 371). Despite the fact that Clinton frequently warned about the possibility of terrorists obtaining WMD during his second term, except for nervousness surrounding the millennium at the end of 1999, most of the general public viewed the threat of foreign terrorists on American soil as remote. When warning Americans about terrorists, Clinton did not use the rhetoric of war or label terrorist incidents as “acts of war” to mobilize public support for his counterterrorism efforts. Instead, Winkler characterized his efforts as portraying “the conflict with terrorists as a battle between good and evil.” (Winkler, 2006: 145) Congress had the opportunity to assist him in this battle by passing legislation favoured by the administration, or according to Clinton’s perspective, they could be “pawns” of the terrorists who targeted Americans and their allies. (Ibid)

In June 1995, Clinton signed Presidential Decision Directive (“PDD”) #39 on U.S. policy on counterterrorism; Benjamin and Simon cite it as one of the first policy documents to address the threat of asymmetric warfare. (Benjamin and Simon, 2003: 230) According to the parts of the PDD which are now unclassified, the Clinton administration sought to “deter terrorism through a clear public position that our policies will not be affected by terrorist

acts and that we will act vigorously to deal with terrorists and their sponsors. Our actions will reduce the capabilities and support available to terrorists." (PDD 39, 1995: 3) In effect, this was similar to the "no concessions" policy articulated by the Reagan administration but subsequently violated when the Reagan administration attempted to trade arms for hostages during the Iran-Contra scandal. In addition, PDD 39 set forth the responsibilities of different agencies involved in counterterrorism including the Attorney General, FBI director, Secretary of State, Secretary of Defense, and others. It also helped centralize control over counterterrorism policy by placing it in the White House. Finally, PDD 39 states, "the acquisition of weapons of mass destruction by a terrorist group, through theft of manufacture, is unacceptable. There is no higher priority than preventing the acquisition of this capability or removing this capability from terrorist groups potentially opposed to the U.S." (PDD 39, 1995:10)

One of the prime movers behind this initiative was a career civil servant named Richard Clarke who was in the State Department during the Reagan and Bush I administrations but moved to the executive branch when Brent Scowcroft gave him a job at the White House. Clarke went on to serve in the Clinton and Bush II administrations in various posts related to national security and terrorism. In several accounts of the Clinton and Bush II administrations, Clarke emerges as one of the important, behind-the-scenes bureaucrats who recognized the threat posed by al-Qaeda and drafted policy options for dealing with it. (Benjamin and Simon, 2003: 232-233) After he left the Bush II administration, Clarke became a controversial figure when he expressed his opinion that terrorism inspired by al Qaeda was not one of George W. Bush's

highest priorities upon taking office in 2001 (instead, missile defense and removing Saddam Hussein were higher priorities). The politically-charged debate over whether Clinton did enough to deter al Qaeda and whether George W. Bush fully appreciated the threat posed by bin Laden emerges often in the memoirs and books written after 9/11 by former officials such as Clarke.

One particularly counterproductive aspect of the Clinton administration's counterterrorism policies and procedures related to the troubled relationship between Clinton and his FBI director, Louis Freeh. Numerous administration insiders have chronicled the strained relationship between the two men and how difficult it was to get Freeh to share information or cooperate in administration initiatives related to counterterrorism. (Benjamin and Simon, 2003: 302-304) Members of the National Security Council, an executive branch agency, received reports on terrorism from the CIA, the State Department, and the National Security Agency, but **not** from the FBI. Moreover, Freeh "showed little interest in the growing phenomenon of Sunni terrorism and played no notable role in U.S. strategizing against al-Qaeda." (Benjamin and Simon, 2003: 304) The FBI director serves for 10 years; therefore, Clinton's only remedy regarding Freeh was to fire him, a "political impossibility" because Freeh was head of the agency investigating Clinton for various reasons including the suicide of Vince Foster (deputy White House counsel during the first few months of Clinton's term). Clarke wrote that Freeh had "back channels to Republicans in the Congress and to supporters in the media" (Clarke, 2004: 117).

Another source of discord between Freeh and the White House was the handling of the Khobar Towers bombing. Truck bomb explosions outside of Khobar Towers in Saudi Arabia on June 25, 1996 killed 19 U.S. servicemen and one Saudi; Freeh took a "passionate interest" in the case and was displeased when the Saudis refused to allow the FBI access to suspects. (Benjamin and Simon, 2003: 300) In the aftermath of the bombing, the identities of the perpetrators were unclear with the Saudis placing the blame on Hezbollah. Others attributed the attack to al Qaeda. Freeh became convinced that the Clinton White House was not pursuing the investigation aggressively enough, a notion disputed by those in the executive branch at the time. According to Benjamin and Simon, the Clinton administration "viewed bringing those responsible to justice as a high priority." (Benjamin and Simon, 2003: 301)

In the end, the Clinton administration soldiered on with Freeh as FBI director despite the friction and discord this caused. Freeh continued at the FBI in the Bush II administration, until June 2001, as threat reporting regarding al Qaeda increased the summer before 9/11. Freeh later faulted the Clinton administration for failing to appreciate the "war" al Qaeda had launched against America and wrote in his book, "We had been feeding the terrorists' embedded belief that the United States lacked the fortitude to fight a real war against them." (Freeh, 2005: 303) Whether better leadership at the FBI or closer cooperation with the Clinton White House would have prevented 9/11 are issues occasionally discussed in the copious literature on the attacks.

After Freeh left the FBI in June 2001, the FBI received at least **two significant reports** concerning al Qaeda in the U.S. but the next FBI director was not appointed until one week before 9/11. The first was the July 10, 2001 memo, known as the "Phoenix Memo," from FBI agent Ken Williams warning that men with suspicious backgrounds were attending flight schools in Phoenix. (Thompson, 2004: 102) The second report concerned the August 15, 2001 arrest of Zacarias Moussaoui, the presumed 20th hijacker in the 9/11 plot. When Moussaoui was arrested, Minnesota FBI agent Coleen Rowley repeatedly tried to get FBI headquarters to grant permission to search his home and computer, but this was not allowed until after 9/11. (Thompson, 2004: 213-214) Freeh denied that leaving the FBI in the summer prior to 9/11 resulted in a leadership vacuum, just as officials in the Bush II administration claimed that preventing the attacks was impossible.

First World Trade Center Bombing

Shortly after Bill Clinton was sworn in as President in January of 1993, a bomb hidden in a rented van exploded in the parking garage underneath the North Tower of the World Trade Center in New York. The February 26, 1993 truck bomb exploded at 12:18 p.m. and killed six people. The explosion also injured around one thousand people in the WTC, and traumatized the entire country. According to Benjamin and Simon, the blast ripped a 150-square-foot crater in the concrete floor and blew through the concourse level of the Vista Hotel. (Benjamin and Simon, 2003: 11) It was conceived as a mass casualty event, one that would not just *damage* the towers, but would result in the collapse of one tower into the other tower.

Followers of Egyptian spiritual leader Sheikh Omar Abdel Rahman planned the attack in "response for the American political, economical, and military support to Israel, the state of terrorism, and to the rest of the dictator countries in the region." (Benjamin and Simon, 2003: 13). In March of 1994, four men (Nidal Ayyad, Ahmad Ajaj, Mohammad Salameh, and Mahmud Abouhalima) were convicted on all counts for their roles in the bombing and are serving life sentences in U.S. prisons. In addition, the ringleader, a Pakistani born in Kuwait named Ramzi Yousef, was captured in Pakistan in 1995 and eventually tried and convicted for the bombing. Yousef, the nephew of Khalid Sheikh Mohammed, is currently serving a life sentence in an American federal prison. Although the first World Trade Center bombing shocked the public, there were few calls for a "war against terrorism" and the law enforcement paradigm seemed to serve the public interest as most of the conspirators were captured and sentenced to life terms.

More shocking terrorist incidents occurred as the Clinton administration wore on and the threat of terrorist attacks began to alarm the general public. Mass casualty events like the January 30, 1995 car bombing in Algiers that killed 42 people and injured 300 more and the January 31, 1996 central bank bombing in Sri Lanka that killed 53 and injured more than 1,400 indicated the willingness of terrorist groups to plan and execute operations with large numbers of casualties. A turning point of sorts occurred in 1995 when a religious cult called Aum Shinrikyo released poison gas in the Tokyo subway and killed 12 while injuring thousands on March 20. Experts within the U.S. counterterrorism community began to notice the rise of religiously motivated terrorists who were less likely to be affiliated with a state. These "ad hoc or

autonomous" groups with "little or no hierarchical structure" appeared to be less inhibited about using weapons of mass destruction (Tucker, 1997: 49).

In addition to mass casualty terrorism abroad, domestic terrorist incidents shocked American citizens in the 1990's. For instance, 168 people were killed when a federal building in Oklahoma City was bombed on April 19, 1995. The next year, at the 1996 Olympic Summer games in Atlanta, a pipe bomb exploded in Centennial Olympic Park in July, killing two. Subsequent investigations revealed that the Oklahoma City and Atlanta bombs were acts of *domestic* terrorism as the perpetrators were American men disgruntled with the U.S. government and the crimes occurred within the United States. The USA Patriot Act confines acts of domestic terrorism to those which occur "primarily within the territorial jurisdiction of the United States." The Oklahoma City bombers, Timothy McVeigh and Terry Nichols, were caught and imprisoned immediately; the Centennial Olympic Park bomber, Eric Rudolph, was caught in 2003 and jailed for life. The Clinton administration's response to these attacks, like the first World Trade Center bombing, was largely the law enforcement approach which involved investigating the perpetrators, arresting them, and processing them through the normal U.S. judicial system.

Attempted Assassination of George H.W. Bush

The first significant use of force by the Clinton Administration in response to international terrorism occurred after an assassination attempt against former President George H.W. Bush in 1993. The attempted assassination of George H. W. Bush occurred when Bush was in Kuwait in

April 1993. The plan was to detonate a bomb in an SUV in Kuwait City as the former President drove by; the Kuwaiti police discovered the bomb and arrested 16 men, two of whom were Iraqi citizens. (Clarke, 2004: 81) Later the CIA and FBI learned that Saddam Hussein's intelligence service was involved in the plot. In June, members of the Clinton executive branch began planning "a retaliation mission against Iraq." Clarke described how a "target list" was developed by the Joint Chiefs of Staff and the CIA to "minimize casualties." (Clarke, 2004: 81)

On June 26, 1993, President Clinton ordered the U.S. Navy to launch 23 cruise missiles against targets in Iraq, including the headquarters of the Iraqi intelligence service (Maogoto, 2005: 113). The attack was done on a Saturday night to minimize casualties but, despite this precaution, some bombs fell short and killed a female artist and seven other civilians across the street from the Iraqi intelligence building. In a letter to Congress written pursuant to the War Powers Resolution, President Clinton noted, "the Government of Iraq's violence and terrorism demonstrates that Iraq poses a continuing threat to United States nationals. . ." He also cited his "constitutional authority with respect to the conduct of foreign relations and as Commander in Chief" and justified the use of force under the right of self-defence in Article 51 of the UN Charter.

Some scholars commented that the timing of this use of force during Clinton's first year in office bolstered his status as a President who was not timid about protecting American interests and citizens. Contemporary news analysis also suggested that the "White House appreciated that the use of

force would help rebuild Clinton's image into that of a strong and decisive leader." (Fisher, 2004: 176) Unlike George H. W. Bush, who served as a fighter pilot in World War II, Bill Clinton never served in the military and had, in fact, avoided service in America's contentious war in Vietnam. Acting tough against Saddam Hussein's Iraq was an easy way to appear strong without incurring substantial political risks.

According to Clarke, the use of force against Iraq in 1993 was successful in that it deterred Saddam Hussein from engaging in more acts of international terrorism directed against the United States during Clinton's administration. (Clarke, 2004: 84) This is noteworthy for two reasons: if it is true, then it supports the proposition that state-sponsored terrorism may be deterred while non-state terrorism, on the other hand, remains more difficult to deter. Secondly, the Bush II administration used the fear of weapons of mass destruction and Iraqi terrorism to advocate invading Iraq after 9/11 but Clarke's analysis suggests that Iraq was successfully deterred in 1993 from engaging in terrorist attacks against the U.S. until the U..S invaded in March of 2003.

Several questions remain regarding Clinton's use of force in this instance including whether the Congress was adequately involved in the process and whether the administration complied with the international legal norms regarding self-defence under article 51. Although Clinton stated he was providing Congress with a report "consistent with the War Powers Resolution," the letter appeared after the missile strike was over and thus, seems more like the President was *informing* Congress rather than *consulting*

with Congress, as the War Powers Resolution requires. One Congressman, Ron Dellums, a Democrat from California, noted that the "unilateral U.S. military action was initiated by the executive alone, and is further evidence of the absolute imperative to reestablish the proper balance between the Executive and Congress." (Hendrickson, 2002: 144) However, most in Congress said very little about the attack, no hearings were held, and no one protested the President's action because most of the country supported Clinton's use of force in this case. In fact, Clinton's approval ratings went up after the missile strike, which conforms to the usual pattern of public approval for short, decisive, low risk executive uses of force.

In addition, Hendrickson sees a parallel between Clinton's use of force against Saddam Hussein and "perceived communist threats of the cold war" in that the American public saw a "clearly defined enemy." (Hendrickson, 2002: 144) Members of Congress had little to gain and potentially lots to lose politically if they decided to question the targeting of such an enemy. Therefore, the political incentives favoured deferring to the President and refraining from questioning how the decision to use force was made. This fits neatly with Koh's pattern of executive initiative, congressional acquiescence, and judicial tolerance except no member of Congress even bothered to take the issue to court (so judicial tolerance is assumed).

Another debatable aspect of Clinton's missile strike in 1993 concerns his reliance on the norms of self-defence under article 51 of the UN Charter to justify the attack. The assassination attempt on George H. W. Bush was made in *April* of 1993 and was unsuccessful so it is difficult to argue that the

U.S. was acting in strict self-defence when it launched missiles in *June*. As two constitutional law scholars wrote, “Calling the U.S. bombing of Iraq an act of self-defense for an assassination plot that had been averted two months previously is quite a stretch.” (Ratner and Lobel, 1993: 24) Nevertheless, reaction from the world community was muted; the “Arab world expressed regret regarding the attack,” but most countries either supported the U.S. or failed to criticize it. (Maogoto, 2005: 113)

Moreover, Clinton defined U.S. national security interests broadly to include responding militarily to a planned attack on a former president in a foreign country. Therefore, according to Hendrickson, Clinton’s missile strike in 1993 resembled the actions of “an imperial presidency, in which the chief executive unilaterally defined the United States’ national security interests and justified his actions through a broad definition of presidential powers and international legal appeals.” (Hendrickson, 2002: 146) Very few constraints, either from Congress or the international legal regime, inhibited Clinton in this instance.

Embassy Bombings in 1998

The second significant use of force in a counterterrorist operation during the Clinton administration occurred as a result of the simultaneous bombings of the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania on August 7, 1998. Approximately 252 people died in the bombings, with the vast majority of the victims being Africans (the American death toll was 12). About 4,000 were injured in Nairobi and 85 in Dar es Salaam. In his

Rose Garden statement shortly after the bombings, President Clinton said, “These acts of terrorist violence are abhorrent; they are inhuman. We will use all the means at our disposal to bring those responsible to justice, no matter what or how long it takes.” (Feste, 2011: 173) Two Clinton administration staffers noted “something qualitatively different from anything that had gone before” in that “no previous terrorist operation had shown the kind of skill that was evident” in the embassy bombings. (Benjamin and Simon, 2003: 257)

Clinton’s response was “Operation Infinite Reach” which involved sending 79 cruise missiles against targets in Afghanistan and Sudan on August 20, 1998. The specific targets were four militant training camps in Afghanistan near Khost and Jalalabad and the Al-Shifa pharmaceutical plant in Sudan. The last target was the most controversial as the Sudanese government denied that it was manufacturing or harbouring chemical weapons. Two Clinton administration staffers wrote that the camp near Khost and the date of August 20 were chosen because intelligence reports indicated that Bin Laden would be there on that day. (Benjamin and Simon, 2003: 260) In his televised address to the nation after ordering the missile strikes, Clinton noted that “law enforcement and diplomatic tools” had been used previously in the fight against international terrorism, but he added that there are “times when law enforcement and diplomatic tools are simply not enough, when our very national security is challenged, and when we must take extraordinary steps to protect the safety of our citizens.” These comments, invoking the threat to American national security, sound similar to statements made by Reagan regarding Libya and later by George W. Bush after 9/11.

In addition to the controversy over the suspect chemical weapons facility in Sudan, Clinton's timing was suspected domestically as a ruse to turn the American public's attention away from the sensational Monica Lewinsky scandal. Only three days before ordering the missile attacks, Clinton had appeared on TV and admitted to an "inappropriate relationship" with the White House intern. Very few members of the general public understood the potential of the little-known terrorist network called "al Qaeda" which was subsequently blamed for the African embassy bombings. The two Clinton administration staffers described the months after the missile strikes as a "nightmare" because the "press picked apart the administration's case for striking al-Shifa." (Benjamin and Simon, 2003: 261) The Clinton administration struggled to explain the threat posed by al Qaeda and the adequacy of its response to the terror network.

Some scholars critical of using military force to combat terrorism point out that Clinton, like Reagan, used self-defence under Article 51 as a justification and this broad interpretation of the right of self defence is not accepted by all members of the world community. The same analysis regarding the legality of Reagan's strike against Libya in 1986 can be applied regarding Clinton's use of missiles in 1998. Specifically, these strikes violated international law and looked more like "retaliation rather than legitimate self-defence." (Maogoto, 2005: 114). As detailed in chapter one, self-defence under Article 51 must meet the requirements of imminence, necessity, and proportionality. The embassies were bombed on August 7 while the missile strikes occurred 13 days later, on August 20, thereby straining the concept of taking *immediate* steps to defend the country. Others argue that the strikes

against training camps in Afghanistan and a pharmaceutical plant in Sudan were neither strictly necessary nor proportionate. (Maogoto, 2005: 114-115) Despite the controversy, world reaction to Clinton's use of force was mixed with most EU countries voicing support for the U.S. action.

In his letter to Congress reporting on military action against terrorist sites in Afghanistan and Sudan dated August 21, 1998, Clinton claimed that the "strikes were intended to prevent and deter additional attacks by a clearly identified terrorist threat." Other members of Clinton's cabinet stressed that bin Laden was planning another attack on U.S. citizens so the President was justified in acting in self-defence. Some viewed this strike as a new policy direction, moving the executive branch into pre-emptive strikes against terrorists, indicating that the U.S. would be taking a more aggressive stance against non-state terrorist networks. The practical problem of how to deter a stateless terrorist group was never solved.

The problem of structuring a military strategy against a terrorist network aided by an Islamic fundamentalist regime like the Taliban continued in the last years of the Clinton administration. From August 20 until the end of his term in office, Clinton had his staffers on the National Security Council work with the Pentagon to identify more targets in Afghanistan. Bin Laden moved frequently inside Afghanistan so it was difficult to trace him and Sandy Berger, Clinton's National Security Advisor, feared that a major bombing campaign aimed at bin Laden might fail and make the al Qaeda leader look "invincible." (Benjamin and Simon, 2003: 284). In fact, the ability of bin Laden to escape American efforts to capture or kill him until May 2011 did serve to enhance his

mythological stature with followers or admirers of al Qaeda's ideology. (Bergen Interview)

From the standpoint of the WPR, Clinton's actions in 1998 require a more complicated analysis because this is one instance in which the President appeared to do real *consultation* with Congressional leaders instead of the usual *notification*. For example, before the strikes occurred, Clinton spoke with the Speaker of the House, Newt Gingrich (Republican of Georgia). In addition, National Security Advisor Sandy Berger spoke with Newt Gingrich, Senate Majority Leader Trent Lott (Republican of Mississippi), the staff of House Minority Leader Dick Gephardt (Democrat of Missouri), and Senate Minority Leader Tom Daschle (Democrat of South Dakota). (Hendrickson, 2002: 106) After the missile strikes took place, a public opinion poll revealed that 40 percent of the American public thought Clinton's military strikes were "influenced by his domestic problems with Ms. Lewinsky" but members of Congress "raised no constitutional objections and no concerns regarding violations or exploitation of the WPR." (Hendrickson, 2002: 107) Thus, it appears that consulting with Congressional leaders prior to using force helped Clinton in the aftermath of the missile strikes when the general public was largely sceptical of striking at terrorist operations in Sudan and Afghanistan.

Several factors may explain Clinton's willingness to comply more completely with the WPR by consulting with Congressional leaders prior to using force. By 1998, Clinton was dealing with a Republican House of Representatives and Senate; he was also vulnerable politically due to the Lewinsky scandal with decreased credibility ratings among the general public.

The August missile strikes occurred a few months before the mid-term elections of 1998 and Clinton would have been aware of the tendency of the President's party to lose seats in mid-term elections. These may have combined to provide political incentives for Clinton to share the intelligence on bin Laden and consult with Congressional leaders to ensure their support prior to launching the missiles.

Another factor which militated against congressional investigation or complaints about the 1998 missile strikes was the nature of the target, i.e. Osama bin Laden and the al Qaeda network. As noted above, these types of targets are similar to well-defined and identified enemies of the U.S. such as the communists during the Cold War and Saddam Hussein after his invasion of Kuwait. The 1998 missile strikes did not involve a sustained military commitment and no American military forces were hurt or killed. Under these circumstances, members of Congress had many incentives to acquiesce in Clinton's use of force against bin Laden.

In July 1999, Clinton signed an executive order that formally designated al Qaeda as a foreign terrorist organization, which meant that it was subject to the sanctions imposed on state sponsors of terrorism. (National Commission, 2004: 125) The issue of how to treat Afghanistan and its Taliban government remained an ongoing problem for the Clinton administration; the U.S. did not recognize the Taliban but some in the administration hoped that their leader, Mullah Omar, could be persuaded to extradite or expel bin Laden to either the U.S. or Saudi Arabia. In December 2000, the U.S. convinced the United Nations to adopt Security Council Resolution 1333, which imposed an arms

embargo on the Taliban. (Ibid) Efforts by the Clinton administration to use Pakistan to pressure the Taliban, like earlier efforts to influence the reclusive regime with sanctions and UN resolutions, were fruitless. After 9/11, advocates of forceful military action tended to portray the Clinton administration's efforts to influence the Taliban and prosecute bin Laden as misguided and pointless moves by an administration that did not comprehend al Qaeda and the U.S. were at "war."

Rendition

Rendition is the "return of a fugitive from one state to the state where the fugitive is accused or convicted of a crime," according to *Black's Law Dictionary*; it is similar to extradition in that suspects are removed from one state to another but extradition usually requires a treaty. In 1986, Ronald Reagan authorized transferring the suspects responsible for the 1983 Marine barracks bombing in Lebanon so that the suspects could stand trial. In 1995 Bill Clinton signed PDD 39 which states, "return of suspects by force may be effected without the cooperation of the host government, consistent with the procedures outlined in NSD-77 (Reagan's PDD), which shall remain in effect." (Fisher, 2008: 330) In other words, under certain limited circumstances, the abduction of suspected terrorists outside of the U.S. was authorized in order to subject them to trial or legal process.

The practice of **extraordinary or irregular** rendition, discussed in greater detail in the chapters about the Bush II administration, became more common after the 9/11 attacks. According to the former CIA chief in charge of

the bin Laden unit, the original goals of extraordinary rendition were to detain al Qaeda suspects and seize documents in their possession. The detainees were then sent to other countries for judicial process, meaning that no abduction was authorized if charges had not been filed against the suspect. (Fisher, 2008: 331) The Bush II administration expanded on this procedure in the "war on terror," and sent people merely **suspected** of terrorism to states known for conducting interrogations with tactics generally considered torture. Nevertheless, as Baker noted, "a rendition must comply with U.S. law," meaning the operation must be "properly authorized." (Baker, 2007: 167). In this manner, Bush II administration officials designed their rendition procedures on precedents from the Reagan and Clinton administrations, and maintained it was lawful.

Bombing of the *USS Cole*

The last al Qaeda attack against Americans in the Clinton administration took place when a Navy ship, the *USS Cole,* was struck by a suicide bombing on October 12, 2000 while harboured in the Yemeni port of Aden. The death toll was 17 American sailors and the 2 suicide attackers. Some terrorism experts do not consider this an act of terrorism because, like the Khobar Towers bombing, the target was *military*, a U.S. Navy ship in this instance, and not random civilians. Leaving that controversy aside, the relevant point for this research is that the *Cole* bombing was used, after the 9/11 attacks, as a tool to criticize the Clinton administration because it did not respond militarily to the attack. In the months after the 9/11 attacks, some commentators maintained that Clinton did not do enough during his term of

office to deter bin Laden and prevent more acts of terrorism. Defenders of the Clinton administration have pointed out that the *USS Cole* bombing occurred during a closely contested presidential election (Bush v. Gore) and responsibility for the attack was not established definitely until after the November 2000 elections. Thus, the argument goes, responding to the *Cole* bombing was the prerogative of the new President, George W. Bush. Whether or not a response would have deterred Osama bin Laden and the al Qaeda network remains an open question. At the time, no one in Congress called on Clinton to respond to the *Cole* bombing with force.

Conclusion

The preceding analysis reveals several items about the use of force by Bill Clinton during his eight years in office. Despite the fact that Clinton was a Democrat and opposed many of the domestic policies of his immediate predecessors, George H. W. Bush and Ronald Reagan, the general pattern on executive branch initiatives regarding the use of force against international terrorism remained the same. In other words, Clinton, like Reagan, rarely invoked the WPR and his "consultation" with Congress was usually the minimal form of notification. The exception, discussed above, was the use of cruise missiles in 1998. Clinton also justified the use of force in Iraq in 1993 and the missile strikes in Afghanistan and Sudan in 1998 as permitted by the international legal standards on self-defence under article 51 of the Charter.

In this manner, Clinton, a Democrat, was not radically different from Reagan regarding the use of force in counterterrorism. Both Reagan and

Clinton justified using force after a terrorist incident as legitimate self-defence. However, the Reagan administration included many officials like George Shultz and Abraham Sofaer who forcefully advocated a war paradigm approach to the problem of terrorism while the Clinton administration approach embodied a law enforcement paradigm with emphasis on the apprehension, conviction, and imprisonment of terrorists. Clinton's preference for a law enforcement paradigm regarding terrorism resulted in considerable criticism after the 9/11 attacks; critics claimed Clinton's failure to respond more often with American military force against al Qaeda emboldened the terrorist network. It remains an open question whether using more force more frequently against al Qaeda in the late 1990's could have prevented 9/11.

Furthermore, the Clinton administration did not significantly depart from the Reagan administration's practice of rendition, in that under limited circumstances, terrorism suspects were removed from one state to another state to stand trial. According to George Tenet, the Clinton administration rendered more than 70 suspects during its eight years in office. These two elements, advocacy of a broad interpretation of self defence in international law and the practice of rendering suspects for counterterrorism, laid the foundations for the "war on terror" unleashed by George W. Bush after 9/11. As discussed in subsequent chapters, the second Bush administration would build upon precedents culled from both the Reagan and Clinton administrations in its approach to counterterrorism.

The phenomenon of international terrorism changed slowly during the 1990's from attacks carried out by state-sponsored groups to more

autonomous religiously inspired non-state terrorist networks. According to Pillar and Preble, one of the most salient trends in the past twenty-five years "has been the trend away from terrorism by regimes towards terrorism by groups." (Pillar and Preble, 2010: 66) The authors then explain that the biggest difference between a state and a transnational network is the "return address" that the state possesses, which facilitates the use of force against the state (Ibid). The Clinton administration appeared to grapple with ways to contain terrorist networks but it did not deviate from the previous pattern of executive initiative, congressional acquiescence, and judicial tolerance as far as the use of force was concerned.

As the Clinton administration came to an end, one of the biggest complaints constitutional law scholars articulated was Clinton's failure to secure congressional authorization for the military intervention, in cooperation with NATO, in Kosovo in 1999. Indeed, one author termed it "one of the most flagrant acts of usurpation of the war power in the history of the Republic" (Adler, 2002: 19). However, as this thesis will illustrate in subsequent chapters on George W. Bush, Clinton's use or possible misuse of force was dwarfed by activities conducted under the guise of the Bush "war on terror" after 9/11. In fact, the Bush II administration borrowed rationales from previous administrations, expanded executive power, and built upon earlier precedents to use force in both Afghanistan and Iraq, all in the name of preventing international terrorism.

Chapter 7
The Administration of George W. Bush

This chapter examines the Bush II administration's use of force by analyzing the case studies of the wars in Afghanistan and Iraq, as well as smaller uses of force entitled "discreet military operations" or DMO's such as the use of drones in Yemen and Pakistan. The first section, **Intellectual Architecture**, assesses the pivotal personalities in the administration, foreign and military policies, the "New Paradigm" for the war on terror, and the wars in Afghanistan and Iraq. While some aspects of the "New Paradigm" for the war on terror, such as signing statements, did not directly involve the use of force, they are included in the discussion because they formed an integral part of the Bush II administration's overall system for implementing a war on terror.

The second section of the chapter, entitled **Discreet Military Operations**, scrutinizes the use of drones in the war on terror, along with other DMO's. An emphasis on drones is warranted due to the fact that they were increasingly used as the weapon of choice in the war on terror, particularly as the insurgency in Iraq consumed other resources in the military. After George W. Bush left office, his successor, President Obama, increased the use of drones as a counterterrorism measure. The continuing questions and controversies surrounding drone use are addressed at the end of the chapter.

Several themes emerge from this examination, including the continuity of American counterterrorism tools from the administration of Ronald Reagan to George W. Bush, despite pervasive rhetoric used by the latter

administration proclaiming more aggressive and innovative approaches to fighting international terrorism. In addition, from the Reagan administration to the Bush II administration, reaction to acts of international terrorism resulted in the expansion of executive power, even though the nature of international terrorism was changing and despite different men from different political parties occupying the White House. Arguably, the policies of the Bush II administration regarding detainees, interrogations, wire-tapping, and other activities tend to indicate a serious lack of constraints on the modern American president and an executive branch that is increasingly unaccountable.

Finally, Koh's pattern of executive initiative, congressional acquiescence, and judicial tolerance combined with the 9/11 tragedy and pervasive fears of another attack created a "perfect storm" of sorts during the Bush II administration. This perfect storm was the ideal environment for executive initiatives in the treatment of detainees, surveillance of the public, and the use of force. Furthermore, powerful personalities in the administration worked in a mutually reinforcing environment that resulted in counterterrorist operations that, at times, worked against long-term American interests. The evidence from the interviews supports the theory that although the second Bush administration "pushed the envelope" in many areas, the system in place allowed it to occur and the possibility that another, similar administration could proceed in the same manner cannot be discounted.

I. Intellectual Architecture

In retrospect, it appears natural that one of the most controversial presidents of the post-World War II era, George W. Bush, would begin his presidency with controversy. The election of November 7, 2000 did not revolve around foreign affairs or international terrorism; the main issues in the contest between Al Gore, Bill Clinton's vice president, and George W. Bush, governor of Texas were domestic problems such as how to spend the budget surplus and moral character. Mr. Bush argued that he would bring "integrity" back into the Oval Office by avoiding the moral failings of the Clinton administration. The election results were closer than most observers expected and the outcome hinged on the results in the state of Florida. After a lengthy dispute about methods of vote counting, the issue was heard by the U.S. Supreme Court, which decided by a 5-4 decision in *Bush v. Gore* to stop the vote recount on December 9, 2000, effectively giving the presidency to George W. Bush. Although he lost the popular vote count by more than half a million votes, Mr. Bush took the oath of office on January 20, 2001.

The second Bush administration began its first term with many people who had served with the elder George Bush, including Richard ("Dick") Cheney as Vice President. Cheney had more experience in government than George W. Bush, having previously served as White House Chief of Staff (during the Ford administration), congressman from Wyoming in the U.S. House of Representatives (from 1979 to 1989), and Secretary of Defense (first Bush administration). This background meant he knew how policy was formulated in both the White House and on Capitol Hill. Cheney's large and pivotal role in shaping the second Bush administration's use of force policies is examined in greater detail in later sections of this chapter because he was

one of the most powerful administration officials. Cheney was concerned about expanding executive power vis-à-vis encroachments by the U.S. Congress from his days in the Ford administration, a theme which runs throughout his tenure as vice president.

Another important member of the second Bush administration was Donald Rumsfeld who was Secretary of Defense from 2001 until 2006, when he was replaced by Robert Gates. Rumsfeld was a seasoned Washington insider, having previously served in the Nixon administration, Ford administration, and the Reagan administration. He became Secretary of Defense at age 43 in the Ford administration and later became the oldest Secretary at age 68 when he joined the second Bush administration. In the 1960's he was a Congressman from Illinois in the House of Representatives. Like Cheney, his many transitions from private business to public service over the years neatly illustrate the concept of a shadow elite that operates in Washington, DC by moving in and out of government, all the while maintaining important contacts and networks with other powerful individuals. One of the most curious episodes in Rumsfeld's career was his work as Reagan's Special Envoy to the Middle East in 1983; he met with Saddam Hussein and restored US relations with Iraq, seen at the time as a bulwark against Iranian influence. Years later, in 1998, Rumsfeld joined other neoconservatives at the *Project for a New American Century* in calling on then- President Clinton to force regime change on Saddam Hussein's Iraq. Cheney and Rumsfeld were partners and philosophical soul-mates in the Bush II administration and according to Bush's recent memoir, *Decision Points*, Cheney did not want Bush to drop Rumsfeld after the November 2006 midterm elections. However,

the decisive victory of the Democrats (who won both houses of Congress) compelled Bush to make the change. (Bush, 2010)

Other pivotal members of the Bush II administration were Colin Powell, the former Chairman of the Joint Chiefs of Staff, as the first Secretary of State and Condoleezza Rice as National Security Advisor. In 2005, Powell resigned and Condoleezza Rice became Secretary of State and Stephen Hadley became the National Security Advisor. Clinton's CIA director, George Tenet, stayed on during Bush's first term and was replaced after he retired in 2004 by Porter Goss. Goss lasted only 2 years as CIA director; Michael Hayden replaced him in 2006. Finally, Louis Freeh was the FBI director when Bush took the oath of office in 2001 but he resigned early and left the FBI in June 2001. He was replaced by Robert Mueller, who took over the FBI one week before the 9/11 attacks.

The creation of the Department of Homeland Security (DHS), the biggest government reorganization in U.S. history, took place as a result of the 9/11 attacks; the department began as a non-Cabinet level office of Homeland Security, headed by Tom Ridge in October 2001. In November 2002, this entity became a Cabinet level department with 22 government agencies such as the Coast Guard, immigration, and customs. DHS was intended to protect the US from terrorist attack and respond to natural disasters like hurricanes. After Ridge resigned in 2005, Michael Chertoff became the Secretary of Homeland Security.

Karl Rove, often given credit as the man who helped elect Bush governor of Texas and then President, served as political advisor to Bush until

August 2007 when he resigned. His tenure at the White House was marred by scandal but his role in making policy regarding the use of force was marginal, so although his name is frequently mentioned in Bush administration histories, he is less important for the purposes of this study. Any examination of the Bush II administration's use of force and counterterrorism actions should begin with the unique and pivotal role of the Vice President, Dick Cheney, and his staff.

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The Influence of Dick Cheney

As an indispensable proponent of the Bush II administration's approach to international terrorism, Dick Cheney warrants in depth examination because much of what occurred during this administration can be traced back to Cheney and the office of the vice president. No other vice president in this study wielded so much power and exerted so much influence over policy as Cheney. While the caricature of Cheney as the puppet master and Bush as the puppet is too simplistic, close examination of the Bush II administration illustrates that many of the specifics of the "New Paradigm" of the War on Terror are attributable to Cheney.

Article II of the US Constitution establishes the office of the vice president but few powers are given to the office holder; throughout most of U.S. history, the vice president has been tasked with ceremonial duties associated with the President's role as head of state. In 1949, Congress made the vice president a member of the National Security Council and President Jimmy Carter's vice president, Walter Mondale, established the

precedent of vice presidents attending cabinet meetings. After World War II, the office of vice president was viewed as a stepping stone to the presidency. Al Gore was Bill Clinton's trusted advisor on many issues including the environment and his selection as the Democratic nominee for President in 2000 was a natural evolution from the office of vice president. Despite the growing influence of vice presidents from Mondale to Gore, few political observers anticipated the unprecedented power Dick Cheney wielded as vice president throughout the Bush II administration.

Cheney's influence began as the man George W. Bush tapped to help find a running mate in the 2000 elections; Bush asked Cheney to head his vice presidential search committee. According to an in depth account of Cheney, as head of the vice presidential search committee, he solicited personal and lengthy information from potential candidates but when Cheney selected **himself** as a vice presidential candidate, no one vetted him. (Gellman, 2008: 23) Cheney is famous for his penchant for secrecy, preference for working in the background away from the spotlight, and ability to retain large amounts of detailed information for later use. Whereas George W. Bush was the outsider from Texas, Cheney was the man who knew how Washington, DC worked and how to get around the inevitable bureaucratic inertia and hurdles that can derail policy initiatives. Bush, the CEO president, delegated duties to his subordinates and planned on focusing on the "big picture" while the chief operating officer dealt with the details. Cheney gladly accepted working on the details in subject areas he cared most about, including the Bush energy plan and then national security when that became the top priority after 9/11.

As chief of staff in the Ford administration, Cheney viewed the post-Watergate reforms enacted by Congress to reign in the "imperial president" as too constricting and detrimental to the executive branch. Schlesinger's persuasive theory about an imperial presidency, defined as one where "the constitutional balance is upset in favor of presidential power and at the expense of presidential accountability," was applied to Richard Nixon. The post-Watergate reforms Cheney deplored included the War Powers Resolution, enacted in 1973 to avoid open-ended military campaigns like the one in Vietnam without Congressional approval. Another reform was the Foreign Intelligence Surveillance Act (FISA), enacted in 1978, to provide the executive branch with the "exclusive" means by which the government can wiretap. This law was a reaction to abuses by the CIA explored by the Church Committee during the Nixon administration. Cheney repeatedly said that the President had become "imperiled" instead of imperial by a series of assertive legislative reforms that sought to reign in the President, but in reality according to Cheney, impinged on the President's constitutionally proscribed powers in matters concerning defence and foreign policy.

Cheney had several sources of power during his tenure as vice president; one was his intimate knowledge of who controls the levers of power and how policy is enacted in Washington, even in the face of determined opposition. (Wilkerson Interview) As head of Bush's transition team during the recount in 2000, Cheney helped appoint many like-minded bureaucrats and followers in important positions in Washington. He had great access to Bush who valued Cheney's loyalty and trusted him as a former member of George H.W. Bush's administration (Secretary of Defense). His lack of

presidential ambition (Cheney consistently let it be known that he did not intend to run for the presidency when his term expired) gave him a measure of freedom in that he did not have to worry about the verdict of potential voters in the future. Many scholars have noted his preference for secrecy, lack of transparency, and the ability to limit the spread of information, even to people in the administration as highly placed as Condi Rice (National Security Advisor) and Colin Powell (Secretary of State). (Gellman, 2008)

Another source of power for Cheney was the lack of vice presidential accountability that prevailed throughout the Bush II administration. Several factors explain this phenomenon, including George Bush's failure to supervise his vice president adequately and the absence of a regular policy-making process within the executive branch, which would have exposed Cheney's policy preferences to competing ideas and agendas. After 9/11, Cheney used the need for secrecy and speed in national security policies to deny relevant information to officials normally included "in the loop." He also excluded important policy-makers from the negotiations which led to the military commission order. (Mayer, 2009: 123-125) Cheney (and the entire Bush II administration for much of the first 6 years) avoided congressional oversight, a topic examined later. Finally, two other features of Cheney's tenure are notable: Cheney avoided the media in general, except on his own terms, and failed to comply with the usual record keeping regulations. (Goldstein, 2009) The last feature occasionally led to satiric results in that the office of the vice president claimed in a dispute with the Information Security Oversight Office of the National Archive in 2007 that the vice president was *not* part of the executive branch despite having argued in the energy task force controversy

in 2001 that the vice president, as *part of the executive branch,* should enjoy the same prerogatives as the President. (Ibid)

No discussion of Cheney's influence is complete without noting I. "Scooter" Libby, Cheney's chief of staff from 2001 to 2005. In addition to being chief of staff, Libby was also given two other positions within the White House hierarchy, which solidified his power; these positions were national security adviser, and assistant to the president. (Gellman, 2008: 44) In a notorious episode from 2003, Cheney and Libby retaliated against a critic of the Iraq invasion, Joe Wilson who wrote an op-ed in the *New York Times* questioning Bush's evidence for war, by revealing that Wilson's wife (Valerie Plame) was a CIA operative. Libby was convicted of perjury, obstruction of justice, and making false statements to federal investigators in 2007 in the Valerie Plame affair. George Bush, under heavy pressure from conservatives to pardon Libby, ultimately spared him jail time by commuting his sentence. Lost in the long media controversy between two narratives of Libby, one as the loyal executive branch official trying to keep America safe and the other as Cheney's attack dog who would do anything to discredit a critic of the White House, was the fact that a long-time covert CIA officer working on weapons proliferation (Plame) had been exposed, potentially decreasing America's security. The Scooter Libby episode is relevant to the administration's approach to using force in that it illustrates how the administration aggressively went after its critics regarding the war in Iraq, rather than engage in a discourse on the merits of the original decision to invade Iraq. Throughout the eight years of the Bush II administration, there was a pattern of transforming policy determinations (for example, should the USA invade

Iraq? Was the evidence of WMD substantial enough?) from decisions on the merits to a politically charged dialogue attacking critics' motives. Scooter Libby and the Plame affair follow this pattern quite neatly.

Another important Cheney aide was David Addington, a conservative attorney who was in the CIA under William Casey and shared Casey's view that congressional oversight of the intelligence community was an "impediment to be circumvented." (Mayer, 2006) In 1989 when Cheney became Secretary of Defense, Addington went with him to the Pentagon and when Cheney became vice president in 2001, Addington followed him. Unlike previous administrations where many of the top positions were filed by lawyers, neither George W. Bush nor Dick Cheney were lawyers and both relied on trusted advisors for their legal advice. (Mayer, 2009: 54) Cheney consistently turned to Addington who combined a background in national security law with a forceful personality; Addington's style impeded free-flowing deliberation. In several instances involving controversial or sensitive subjects such as the interrogation of detainees, Cheney relied on advice from Addington and shut others who might have different legal opinions out of the policy-making process. From various accounts of decision-making in the administration, both Cheney and Addington preferred a small, closed, group of policy-makers and eschewed the normal constraints inherent in a democracy such as legislative oversight and enquiries from the media. In the words of one lawyer who served in the Reagan administration, "reducing Congress to a cipher" was a large "part of Cheney and Addington's political agenda." (Fein Interview and Mayer, 2009: 54)

The Bush II administration's reliance on Cheney and Addington's views regarding international law, national security law, and the laws of war occasionally embroiled the administration in years of litigation with some cases (notably on detainee treatment) ultimately being decided by the U.S. Supreme Court. When the White House was discussing how to handle newly detained prisoners from Afghanistan in 2002, an influential Congresswoman on the House Intelligence Committee, Jane Harman, came to Addington with proposals on how to treat the new detainees in the WOT. Harman believed Congress should approve legislation for dealing with detainees under Article I, section 8 of the Constitution (Congress has the power to "make rules concerning captures on land and water"). Addington dismissively replied that the section only applied to "pirates," a contention that is not universally accepted by legal scholars. (Gellman, 2008: 172) Harman acquiesced in Addington's proposal. As discussed in the section on "New Paradigm" for the war on terror, the rules Cheney, Addington, and a few others designed for this new type of war often conflicted with areas of American and international law long considered settled.

Foreign Policy

While campaigning for the presidency in 2000, George W. Bush famously stated his preference for a "humble" foreign policy, indicating his unwillingness to involve the U.S. in activities like "nation building." He did not run on his foreign policy credentials which were slim because he did not have to; the U.S. was at peace and with the demise of the Soviet Union, few other countries appeared capable of rivalling U.S. military superiority. Unlike his

father, Bush did not have extensive experience abroad or in government. He was the governor from Texas whose appeal to the electorate came largely from his folksy manner, apparent everyman likeability, and ability to distinguish himself from the other presidential contender, the stiff policy wonk Al Gore (jokingly called "Al Bore" by some commentators). George W. Bush also wisely never tried to pretend he was an international affairs expert; rather, he pledged to be a CEO President, delegating judiciously and surrounding himself with knowledgeable advisors. Terrorism was rarely mentioned on the campaign trail, or in Bush's speeches despite the fact that terrorists associated with al Qaeda had blown a hole in the *USS Cole* in October 2000. International terrorism did not register with the American public as a pressing problem during the fall campaign. Much later, after 9/11, questions arose regarding the lack of response to the *Cole* attack but, during the 2000 elections, the voters did not press George W. Bush on how he would handle terrorism.

Although his background in international affairs was slight, George W. Bush unleashed a "revolution" in foreign policy in that he shed the constraints of multilateralism and acted on his belief that "American unbound should use its strength to change the status quo in the world." (Daalder and Lindsay, 2005: 13) Bush and his advisors viewed the Clinton administration's preference for multilateral action in the international arena as a weakness that unduly constricted America's actions and complicated its strategy because it required the U.S. to consult and compromise with allies. Prior to 9/11, the second Bush administration focused on large nation states such as China and Russia because the principals in the administration assumed these states

posed the major threats and challenges to America. Indeed, Condoleezza Rice, a close friend and foreign policy advisor to candidate Bush, wrote an article in *Foreign Affairs,* which concentrated on powerful nations like China and Russia and only briefly mentioned state-sponsored terrorism. (Rice, 2000) After 9/11, the focus shifted dramatically to non-state terrorist groups and "rogue" states such as Iraq, Iran, and North Korea who might be willing to materially assist terrorist groups. However, the underlying core principle, the preference for unilateralism, remained the same. (Daalder and Lindsay, 2005)

In the first months of his administration, George W. Bush emphasized his willingness to use unilateral action and the "hard power" approach instead of the "soft power" approach of the previous administration. Hard power involves the use of military force and coercive measures to influence other states' behaviour, while soft power "relies on the appeal of American culture and values to enable the United States to influence the behaviour of other states." (McCormick, 2004: 195) In keeping with his belief in unilateralism, George W. Bush rejected the Kyoto Protocol, opposed the Comprehensive Test Ban Treaty and the International Criminal Court, and withdrew from the Anti-ballistic Missile Treaty of 1972. In addition, the second Bush administration promoted military preparedness and promised to develop and deploy a missile defence system that would protect Americans from missiles launched by rogue states. From the very start of his administration, George W. Bush was determined to break with the foreign policy of the Clinton administration which was criticized for being too multilateral, too accommodating of other nations' perspectives and, in general, subordinated to domestic policy.

Various scholars have debated the issue of whether foreign policy making during the Bush II administration was the product of George W. Bush or the result of the overwhelming influence of the neoconservatives in his administration. Much has been written on this topic; most analysis falls into one of the two categories, those who believe Bush was uninterested in foreign affairs and thus was easily influenced by those around him with more experience and firm neoconservative principals such as Cheney, and those who claim Bush made the choice to unleash a revolution in foreign affairs due to his own inclinations and personality. For example, Daalder and Lindsay write that commentators who described Bush as controlled by neoconservatives misunderstood George W. Bush because he was not a "figurehead." (Daalder and Lindsay, 2005: 15) In his memoir, *Decision Points*, Bush strives to portray himself as the decider, not a puppet controlled by others. An analysis of the details of policy making in his White House indicates that Bush left the details to others, preferring the short executive summary; this arrangement gave his vice president and the vice president's office the ability to impact policy in the manner that Cheney wanted. According to Lawrence Wilkerson, Colin Powell's chief of staff, Cheney and the members of his staff understood the "bureaucratic game" very well and knew how to "play it" to get their preferred outcome. (Wilkerson Interview) He also called them "the most effective team in government." (Gellman, 2008: 364)

Prior to the attacks of 9/11, the Bush II foreign policy was oriented towards the traditional states which might threaten American interests, primarily Russia and China. This was natural due to the backgrounds of the

foreign policy heavyweights in the administration, i.e. Cheney, Rice, Rumsfeld, and other neoconservatives such as Wolfowitz. In its reliance on the military, the Bush II administration was following the basic outlines of previous American administrations. Since World War II, American foreign policy makers have succumbed to "military metaphysics," the tendency to see international issues as military problems and to discount the likelihood of finding a solution except through military means. (Bacevich, 2005: 2) Despite the demise of the Soviet Union, successive American presidents have maintained or increased high levels of spending on the military and subscribed to Cheney's theory that force "makes your diplomacy more effective going forward, dealing with other problems." (Keen, 2004: 1)

After 9/11, the national security apparatus of the U.S. government switched gears to focus on al Qaeda and the Taliban as the newest threats to American security. Despite this orientation, Cheney and other neoconservatives within the administration were already planning on eliminating the regime of Saddam Hussein in Iraq, part of the Project for a New American Century's agenda since 1998. Less than six months after the attacks, Bush spoke of an "axis of evil" in his State of the Union address on January 29, 2002; he was referring to Iraq, Iran, and North Korea. Although the three countries did not coordinate policy (and, in fact, Iraq and Iran had fought a bitter war in the 1980's), Bush put them together in his rhetoric to evoke the "Axis powers" in World War II, i.e. Germany, Italy, and Japan. (Sanger, 2009: 42) Powell, who claimed not to have seen the State of the Union text in advance, disliked the rhetoric even though the neoconservatives

approved of the phrase; it reminded them of Reagan's characterization of the Soviet Union as the "evil empire." (Sanger, 2009: 43)

George Bush's views on the post-war concepts of deterrence and containment were outlined in a speech he gave at West Point on June 1, 2002, when he stated, "For much of the last century, America's defense relied on the Cold War doctrines of deterrence and containment. In some cases, those strategies still apply. But new threats also require new thinking. Deterrence -- the promise of massive retaliation against nations -- means nothing against shadowy terrorist networks with no nation or citizens to defend. Containment is not possible when unbalanced dictators with weapons of mass destruction can deliver those weapons on missiles or secretly provide them to terrorist allies." Bush went on to declare, "If we wait for threats to fully materialize, we will have waited too long," signalling that the U.S. was embracing an assertive preemption in its foreign policy. (Bush Remarks at West Point, 2002)

A few months later in September 2002 the National Security Strategy was issued. It is often cited as the first clear articulation of what came to be called the "Bush Doctrine." In one passage discussing emerging threats, the National Security Strategy states,

> *The security environment confronting the United States today is radically different from what we have faced before. Yet the first duty of the United States Government remains what it always has been: to protect the American people and American interests. It is an enduring*

American principle that this duty obligates the government to anticipate and counter threats, using all elements of national power, before the threats can do grave damage. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. There are few greater threats than a terrorist attack with WMD.

To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively in exercising our inherent right of self-defense. (National Security Strategy, 2002)

Bush himself described four parts to the Bush Doctrine in *Decision Points*:

- "Make no distinction between the terrorists and the nations that harbor them---and hold both to account"
- "Take the fight to the enemy overseas before they can attack us again"
- "Confront threats before they fully materialize"
- "Advance liberty and hope as an alternative to the enemy's ideology of repression and fear." (Bush, 2010: 396-397)

Many different scholars and commentators subsequently criticized the Bush Doctrine; one of the most relevant criticisms was its "considerable conceptual confusion, most importantly by conflating the notion of *prevention* with that of *preemption*. (Korb and Wadhams, 2006) The difference between preventive war and preemptive strikes seemed murky and, at times, Bush II administration officials were unable to articulate the distinction. (Heisbourg, 2003) While some saw the Bush Doctrine in action with the invasion of Iraq (a

preemptive strike against a country with WMD), Rice later claimed that invading Iraq was not preemption, but rather the enforcement of UN resolutions long ignored by Hussein. In her book, *No Higher Honor*, Rice explained that the "final piece" of the Bush Doctrine was the administration's "choice of promoting freedom in the Middle East and elsewhere," rather than settling for more stability. (Rice, 2011: 325)

In addition, some political scientists criticized the administration's proclaimed "freedom agenda," the promotion of democracy as a way to forestall terrorism, due to the lack of empirical evidence showing liberal democracy "reduces or prevents terrorism." (Gause, 2005) In fact, truly democratic elections in certain Middle Eastern countries could result in Islamist parties and governments that were more hostile to the foreign policies of the U.S. than the previous undemocratic regimes.

Military: Growth from Cold War to the War on Terror

There are both similarities and differences between George W. Bush's foreign policy and those of his immediate predecessors. One of the most important similarities was the administration's reliance on American military force instead of diplomacy to advance U.S. interests in the world and prevent international terrorism. The trend toward the militarization of U.S. foreign policy can be traced as far back to the end of World War II when the United States emerged as a superpower with the Soviet Union as the only real rival in terms of military strength. During the Cold War, American politicians frequently justified spending large amounts on military equipment, weapons, and the Pentagon in general as necessary to counter the Soviet threat.

Although attempts were made to control the arms race between the superpowers, they were never entirely successful and the American public became used to large expenditures on the military.

Quantifying the Pentagon budget is notoriously difficult due to several variables including the classified nature of certain intelligence budgets and the fact that not all defence spending is part of the Department of Defense (DOD) budget. In addition, there is a "Black Budget" which includes the costs of doing intelligence work and covert operations. According to the *New York Times*, the black budget "nearly doubled in the Bush years" to close to 32 billion dollars per year by 2008. The Congressional Budget Office calculates that in 2001 the DOD budget was 291.1 billion; by 2010 it had grown to 708 billion dollars. This represents an increase of 9% annually on average from fiscal year 2000 to 2009.

Equally important, the funding for the wars in Afghanistan and Iraq during the Bush II administration was not always included in the regular Pentagon budget, which is subject to congressional oversight by various committees including the appropriations committee. One of the major methods of reining in executive power has traditionally been the "power of the purse," the ability of Congress to prevent the president from pursuing some foreign policy initiative by not appropriating the money for it. However, this requires an active Congress with the desire to rein in the executive; this was absent during most of the Bush II administration. Instead, the executive branch requested and Congress agreed to fund the wars in Afghanistan and Iraq through a device known as supplemental budget legislation or an

"emergency supplemental" appropriation. For instance, from September 11, 2001 to 2006, Congress appropriated $331 billion from military operations in Afghanistan, Iraq, and elsewhere as part of the WOT; $301 billion or 91% was provided in supplemental or additional emergency funding. After the initial use of force in Afghanistan and Iraq, it was no longer credible to argue that spending in these wars was "emergency" or unexpected. The extended use of supplemental funding legislation to fund these operations was criticized by many Republicans and Democrats in Congress as a distortion of the normal budgeting process. Moreover, in December 2006 the bipartisan Iraq Study Group recommended that the "normal budget process should not be circumvented."

In addition, funding the wars in Iraq and Afghanistan in this manner allowed the Bush administration to avoid the limits on total discretionary federal spending and meant they were not subject to the full congressional appropriations review process. (Daggett, 2006) The Bush II administration justified funding the wars in this manner by historical precedent; it pointed to previous administrations during the Korean War, Vietnam War, and conflicts in the 1990's when additional supplemental funding augmented the normal Pentagon budgeting process. However, the clever use of past history obscured the fact that close analysis of previous administrations' use of supplemental war funding reveals it was generally brief and ended as soon as funding the conflict in the normal manner was possible. (Ibid) Moreover, as Wilkerson pointed out in an interview, funding wars in this manner is a "disaster" because it ensures that "nobody knows how much we are spending" and there is "no high level accountability for waste." (Wilkerson Interview)

Currently the United States spends almost as much on defence as the rest of the world combined, which means the U.S. is outspending its two biggest military rivals, Russia and China, although figures for China are estimates. (Maddow, 2012: 187, SIPRI Database) Spending on the DOD accounts for one half of all discretionary spending in the U.S. and the Chairman of the Joint Chiefs of Staff, Admiral Mike Mullen, suggested in 2008 that the U.S. should continue to devote 4% of GDP to the military per year. Given the current economic conditions, it is not certain that this spending is sustainable.

The New Paradigm for the War on Terror

The following discussion of the "New Paradigm" erected to fight the war on terror highlights its influence on the use of force during the Bush II administration. As noted previously, when the Reagan administration used force against international terrorism by bombing Libya in 1986, it justified its actions by reference to Article 51 of the UN Charter which allows states to use force in self defence in the event of an armed attack. This was also the rationale for the Clinton administration when it bombed Iraq in 1993 and sent cruise missiles to Afghanistan and Sudan in 1998. The Bush II administration claimed several sources of authority for its WOT. Like the Reagan and Clinton administrations, it asserted the U.S. was entitled to acts in self-defence under Article 51 after 9/11. For domestic legal purposes, it relied upon two authorizations: the Authorization for Use of Military Force of September 18, 2001, known as the AUMF to justify the campaign against the Taliban in Afghanistan; and the Authorization for Use of Military Force in Iraq

passed by Congress in 2002. However, the Bush II administration erected a more sophisticated legal framework than the Reagan or Clinton administrations in that it established a "New Paradigm" for the WOT that enlarged the powers of the President to fight terrorists.

The New Paradigm for the WOT was broadly based on the President's Article II powers as Commander-in-chief and, in some cases, built on previous concepts used by earlier administrations. When asked to compare and analyze the differences between the Reagan administration's use of force against terrorism and the Bush II administration's, an attorney in the Reagan administration, Bruce Fein, pointed to the fact that Reagan used force only once, against Libya in 1986. (Fein Interview) He went on to add that Reagan's use of force was a limited, "one shot deal" that did not change the legal architecture of the country. (Ibid) According to several accounts, the lawyers working on the WOT intended to "transform the fight against terrorism from a criminal justice matter to a full-fledged military war, thereby allowing the CIA and Pentagon to kill or capture and question terrorist suspects as swiftly as possible, with as much latitude as possible." (Mayer, 2009: 52)

Many of Cheney's objectives for the executive branch, culled from his speeches and the minority report of the Iran-Contra Affair, became foundational elements of the New Paradigm. For example, Cheney wanted to "restore" or expand presidential power, "enlarge the zone of secrecy around the executive branch, to reduce the power of Congress to restrict presidential action, to undermine limits imposed by international treaties, and to nominate judges who favoured a stronger presidency." (Savage, 2007: 8) In an

exhaustive study of the UK and US legal regimes, Donohue found that in both systems, counterterrorist law "increases executive power, both in absolute and relative terms, and, in so doing, alters the relationships among the branches of government." (Donohue, 2008: 3) This increase in executive power was exactly what Cheney and his aides intended, long before the attacks of 9/11 gave them the opportunity to enact their agenda.

The philosophical foundations of the New Paradigm have extensive legal roots; many of the men who wrote the legal memos supporting the Bush II administration's legal theories for the use of force, detention, and other aspects of the WOT have impressive legal educations. The primary authors of the New Paradigm in the WOT were Addington, his protégée, Timothy Flanigan, associate White House counsel (2001 to 2002), Jay Bybee, head of the Office of Legal Counsel (OLC) in the Justice Department (2001 to 2003), and John Yoo, author of many once-secret legal memos, a young conservative lawyer in the OLC (2001 to 2003). Jim Haynes, General Counsel at the Department of Defense during the Bush II administration, was also part of the small circle of lawyers who constructed the New Paradigm. Alberto Gonzales, White House counsel from 2001 to 2005 and then Attorney General from 2005 to 2007, was present for many important legal decisions and memos but acquiesced to the details, instead of authoring them. These men tended to refer to themselves as "the War Council" and wrote the memos for the WOT "with virtually no experience in law enforcement, military service, counterterrorism, or the Muslim world." (Mayer, 2009: 66)

The New Paradigm was partially built on the foundations of the unitary executive theory. A brief examination of the legal background of the unitary executive theory illustrates how the Bush II administration borrowed from, and expanded upon, ideas developed in the Reagan administration. The unitary executive theory is a doctrine of American constitutional law that has two manifestations; one posits that the President has control over the executive branch, including the supposedly independent regulatory agencies such as the Securities and Exchange Commission (SEC) and the Food and Drug Administration (FDA). The second, more controversial version of the unitary executive theory is the one propounded by Bush II lawyers and the conservative Federalist Society. Several lawyers in the Reagan Justice Department, including Samuel Alito (who became a Supreme Court Justice in 2006), promoted the view that the Framers of the U.S. Constitution proposed that the President have "independent authority, unchecked by the other branches of government, to decide what the law means." (Drew, 2006: 12) During the Reagan administration, this was just another conservative legal theory advocated by the Federalist Society.

When George W. Bush came to office in 2001, the broader version of the unitary executive theory was resurrected out of law journals. Many of the powerful lawyers in Cheney's office, including Addington, supported a robust application of the theory. At the Justice Department, John Yoo, in the OLC, based many of his legal memos on the notion that the U.S. Constitution envisages a strong executive with powers similar to the British monarch in the 18th century. This included the power to make war. However, many critics, including Fisher and Adler, contend that the Framers of the Constitution were

extremely suspicious of monarchical power and would not have granted the American President such discretion in foreign policy matters. Yoo and other unitary executive adherents counter that the intent of the Framers was to establish an energetic President who would protect the country, and, additionally, the Framers empowered Congress with the means to check executive branch foreign adventures by cutting off appropriations.

Many of the administration's legal memos outlining the President's powers remained secret until something leaked to the press; then the usual pattern was controversy leading to a repudiation, partial reversal, or amendment of the memo. In fact, the memos might change "on the surface," but they continued to follow the path advocated by Cheney and others in expanding executive authority to permit practices that the U.S. had previously condemned when done by other states. (Cole, 2009: 11) According to Cole, a law professor, "despite repeated assurances that the U.S. 'does not torture,' official U.S. policy, as reflected in the secret memos, continued to authorize the CIA to strip suspects naked, deprive them of sleep for seven to eleven days straight, slam them into walls, slap them, douse them with cold water, force them into painful stress positions and cramped boxes for hours, and waterboard them repeatedly." (Ibid)

Signing Statements

One device that the Bush II lawyers seized upon to expand presidential powers is known as a presidential "signing statement," an official

announcement issued by the President contemporaneously with the signing of a bill into law. (Garvey, 2012) Although they have been used by Presidents since the early 19th century, it is the modern usage of signing statements, starting with Reagan, that caused controversy. Reagan initiated the practice of issuing signing statements "to assert constitutional and legal objections to congressional enactments." (Ibid) In fact, Samuel Alito at Reagan's Justice Department wrote a memo advocating their use as a means to increase the power of the executive branch to shape the law. (Fisher, 2007: 192) However, it was President George W. Bush who "used this instrument as part of a comprehensive strategy to strengthen and expand executive authority generally." (Garvey, 2012: 26)

The best example detailing how a signing statement could modify the terms of the WOT occurred at the end of December 2005, when President Bush signed a defence authorization bill into law. The bill contained a ban on torture that was the result of a long battle between the executive branch, led by Cheney lobbying Congress, and Senator McCain, who adamantly insisted on adding a provision banning torture. It appeared that McCain won after the White House stated it would accept the torture ban. (Savage, 2007: 223) However, the Bush II administration quietly inserted a signing statement into the bill, which asserted that President Bush had the power to "construe" the torture ban as "giving him an unwritten waiver for special national security circumstances." (Savage, 2007: 226) While passage of the torture ban was big news, the insertion of the signing statement, which altered the executive branch's obligations under the ban, into the Federal Register (a compendium of U.S. law) was done shortly before New Year's Eve to attract little public

attention. By the end of his administration, George W. Bush had issued more than 1,000 challenges to distinct provisions of law. (Garvey, 2012: 8) The long-term effects of these presidential signing statements are unclear, but Fisher urged close scrutiny of the practice to guard against executive abuse and arrogance. (Fisher, 2007: 210)

Press secretaries in the Bush II administration frequently defended aspects of the New Paradigm by referencing practices under previous administrations, as if to say, this is not new; it has all been done before. Close examination of the practices reveals that while previous administrations may have used them on occasion, their use was sporadic and not intended as an expansion of executive branch prerogatives. In addition to signing statements, another prime example is extraordinary rendition, discussed below. Moreover, previous administrations did not claim so much executive branch discretion to fight international terrorism, nor consciously attempt to leave executive branch precedents for other Presidents to follow. The following sections consider other WOT policies of the Bush II administration briefly.

Rendition

As explained in the Clinton chapter, rendition or the practice of removing a suspect accused or convicted of a crime from one state to another state in the absence of an extradition treaty did not begin with the war on terror. During testimony at the Senate Intelligence Committee in 2000, CIA Director Tenet testified that the CIA had rendered more than 70 suspects

during the Clinton administration and described bringing “more than two dozen terrorists to justice” (Fisher, 2008: 330). It is unclear whether this means they were brought to trial in the U.S, or turned over to another country for judicial process. One report by the New America Foundation documented 117 cases **before** September 11, 2001. (Mayer, 2009: 108-9) In his book, Grey listed 23 renditions from 1987 until September 11, 2001. (Grey, 2006: 269-271)

However, the Bush II administration implemented an “extraordinary rendition” program after the 9/11 attacks, which remains somewhat shrouded in secrecy. Many documents related to the second Bush administration’s program are currently unavailable as they continue to be classified as top secret. According to one in-depth examination, the difference between Clinton’s renditions and the ones conducted by the Bush II administration is “before September 11, the program was aimed at rendering *criminal suspects to justice*, but afterward it was used to render suspects outside the reach of the law.” (Mayer, 2009: 108) According to Baker, a former legal advisor to the National Security Council, the U.S. renders people to other states “to facilitate intelligence gathering, disrupt terrorism planning, as well as to facilitate the prosecution of terrorist suspects.” (Baker, 2007: 166) He acknowledged that the post-9/11 practice of rendition raised “legal and policy concerns” because “persons rendered to certain third countries may indeed be subjected to treatment considered abhorrent or unlawful in the United States or by the international community on whose assistance the United States depends.” (Baker, 2007: 167)

In addition, a troubling aspect of rendition is the exact number of people subjected to it during the Bush II administration remains unknown. Estimates indicate hundreds may have been rendered. (Baker, 2007, Grey, 2006) One report on renditions undertaken by NYU Law School and the New York City Bar Association found that "at least 150 people were renditioned between 2001 and 2005." (Mayer, 2009: 108-9) Furthermore, another unknown is the fate of some of those rendered to countries where torture or inhuman treatment occurs; some detainees are simply unaccounted for, years after they were detained. Although Congress could have demanded answers from the executive branch on this practice, there was no political incentive to investigate the Bush II administration.

In this manner, the Bush II administration built on the precedent of capturing terrorist suspects wanted for trial and subject to procedural safeguards and, after 9/11, turned it into a clandestine method of abducting people merely *suspected* of terrorist activity or ties. This transformation resembled independent and arbitrary executive law. (Fisher Interview) Fisher noted how "extraordinary rendition" involved transferring people to a third country (usually Egypt, Syria, Morocco, or Jordan) where inhumane treatment or torture was known to happen. Although Bush II administration officials continued to deny any one was subjected to torture, the evidence indicates that these practices occurred under circumstances American officials should have known might involve torture.

For instance, one detainee who was a Lebanese-German, Khaded al-Masri, was taken off a bus in Macedonia in 2003 and sent to Afghanistan.

After several months of interrogations and abusive practices, he was not charged with any crime and then released. (Fisher, 2008: 352-4) The WikiLeaks exposures of U.S. State Department documents in November 2010 revealed that U.S. diplomats in Berlin pressured the German government to drop any investigations of CIA agents involved in al-Masri's rendition. His attempt to get redress from the U.S. government was unsuccessful when the Supreme Court dismissed his lawsuit in 2007 due to the "state secrets" doctrine.

In another case, an Egyptian living in Italy named Abu Omar was kidnapped in Milan on February 17, 2003 because the CIA suspected he was involved in terrorist recruiting. Abu Omar was flown to Egypt, interrogated, and abused until his release in 2007. After an investigation by Italian magistrates, an Italian judge convicted 22 CIA agents in absentia for the abduction in 2009. This is one of the rare instances when any one involved in an extraordinary rendition has been held accountable, although the CIA agents were not in Italy for the trial and, presumably, will not travel to Italy to avoid arrest.

Numerous investigations by newspapers and independent organizations detail abductions and abuses carried out clandestinely to further the war on terror. In November 2010, Amnesty International released a 57-page report entitled *Open Secret: Mounting Evidence of Europe's Complicity in Rendition and Secret Detention* that examined how European governments cooperated or tolerated covert activity by the CIA. The report detailed how European countries allowed secret CIA flights to cross their air space and the

existence of secret detention centres in Poland and Romania. The lack of accountability by the U.S. and members of the Bush II administration are explored further in the next chapter on George Bush's legacy.

Ghost Detainees

In *Ghost Plane: The True Story of the CIA Torture Program*, Grey traced the extraordinary renditions of al Qaeda suspects who become ghost detainees at one of the CIA's black sites, or in another secret prison. By investigating the flight plans of CIA flights and tracking down suspects who have been subjected to this treatment, Grey documented the existence of the program and its effects on detainees. One Canadian born in Syria, Maher Arar, was detained in New York in September 2002, deported to Syria, and beaten after he denied involvement with al Qaeda. (Grey, 2006: 62-78) Under the norms of human rights law, specifically article 3 of the Convention Against Torture, the U.S. is not permitted to send some one to a country where it is likely that they will be tortured. However, the U.S. sent Arar to Syria despite the law. Eventually, the Canadian government apologized to Arar and awarded him a settlement. (Toope, 2005). However, the U.S. government continues to deny any wrongdoing and classifies his treatment as a *deportation*, not rendition. Arar's lawsuit against American officials in the Bush II administration was subsequently dismissed on national security grounds.

Beginning late in 2004, newspaper accounts described a shadowy practice of CIA abductions involving flying people to undisclosed locations or

"black spots" where they remained both beyond the normal reach of the U.S. court system and not accounted for as normal prisoners of war to the Red Cross. (Priest, 2004: 1) Eventually the Red Cross gained access to 14 of these "ghost detainees" in CIA custody and wrote a confidential report on their findings. When parts of the report began to leak into the press, the details described clearly indicated that the U.S. government was involved in practices that were considered either torture or inhuman and degrading treatment under commonly accepted international legal norms (Mayer, 2009: 244-245). No previous administration had authorized the drastic step of establishing "black sites" where high value detainees were held and interrogated. In fact, from Reagan to Clinton, the working presumption was that terrorism suspects should be tried in a criminal law procedure under a number of federal statutes in a U.S. federal court. The other working presumption was that no one should be held "off the books" as a detainee by the U.S. government.

The New Paradigm for the WOT aided the establishment of these "black sites" with a two-step legal reasoning process that began by positing the President as Commander-in-chief with the constitutional duty to protect the nation. The second step in the process was to greatly expand the executive's areas of discretion and competence without input from the other branches of government due to exigencies of the war on terror. For example, as a "wartime president," as George W. Bush frequently called himself, the President had the authority to suspend the Geneva Conventions and the Bush II administration was careful to point out that the battlefield extended all over the world. This is the position taken in a memo dated January 9, 2002 written by John Yoo and Robert Delahunty, both at the OLC in the Justice

Department, to Jim Haynes at the Department of Defense. (Greenberg & Dratel, 2005: 38-79) As a *policy* matter, the President could still apply the protections of the Geneva Conventions to Taliban and al Qaeda detainees (and, indeed, George Bush, declared during a press conference in 2002 that the U.S. would) but he was not required *by law* to apply the conventions.

This was the first time any U.S. President had denied the applicability of the treaties since they were enacted in 1949 and some in the administration felt it was not in the long-term interests of the U.S. to take this position. Colin Powell, former soldier and chairman of the Joint Chiefs of Staff, argued that it was counterproductive and might result in other countries' disregarding the treaty regime and could adversely affect military discipline. In a memo, Powell wrote that applying the Geneva Convention on the treatment of Prisoners War (GWP) to the war on terror in Afghanistan would present a "positive international posture" and preserve American "credibility and moral authority." (Greenberg & Dratel, 2005:123)

However, Powell was in the minority in the Bush II administration on this issue; Gonzales (then White House counsel) summarized different positions regarding whether the Geneva Convention on Prisoners of War applied to the Taliban and al Qaeda in his January 25, 2002 memo to President Bush. (Fisher, 2008: 216). Rumsfeld and the lawyers in the OLC agreed with Gonzales that contemporary terrorism was a "new type of warfare" that required executive branch "flexibility." According to Fisher, the effect of this approach was to "exclude Congress" with an executive branch fiat. It also substituted binding treaty law with a "unilateral administration

policy that could be altered, modified, or rescinded" whenever the executive branch felt it was necessary or desirable. (Fisher, 2008: 216) Many legal scholars like Cole and Fisher chart the administration's subsequent descent into practices normally considered torture to its decision to suspend the Geneva Conventions early in 2002. The White House decision on the Geneva Conventions also conforms to Koh's pattern of executive initiative, followed by congressional acquiescence.

Detainees and their Rights

Only a brief outline of the Bush II administration's guidelines for holding and treating detainees is possible; several books explore the entire detention regime. (Sands, 2008, Greenberg, 2006) In his 2011 book, *In My Time*, Cheney lamented that critics advocate closing detention camps like Guantanamo in part because it harms America's image as a liberal democracy. According to Cheney, "it's not Guantanamo that does the harm, it is the critics of the facility who peddle falsehoods about it." (Cheney, 2011: 356) Many members of the second Bush administration maintain the narrative that its practices regarding detainees in the WOT were always legal and above reproach, despite evidence to the contrary.

Shortly after September 11, Dick Cheney warned ominously that the U.S. would have to work "on the dark side" to eradicate terrorists; at the time, no one quite knew what that entailed. (Gellman, 2008: 160) Gradually the parameters of the New Paradigm for the war on terror began to emerge as program details were leaked and, as the panic of the original attack on 9/11

receded, Americans realized the Bush II administration was not afraid to reorder long-held legal positions. For example, shortly after U.S. forces arrived in Afghanistan in October 2001 to remove the Taliban from power, the problem of where and how to detain prisoners emerged. At the end of December, Rumsfeld announced that those captured in Afghanistan would be taken to Cuba where the U.S. had a military base. Guantanamo or GITMO soon became infamous as the camp where hundreds of detainees were held.

The overwhelming evidence shows that the Bush II administration choose to establish a detention at GITMO because a small group of administration lawyers believed it was outside the jurisdiction of U.S. federal courts. In a memo from Patrick Philbin and John Yoo to Jim Haynes dated December 28, 2001, the two OLC lawyers wrote, "federal courts lack jurisdiction over habeas petitions filed by alien detainees held outside the sovereign territory of the United States." (Greenberg & Dratel, 2005: 29) This was not a minor legal point for the Bush legal team; it meant that detainees would not be able to challenge their detentions with a habeas corpus petition. For many legal commentators, including Bruce Fein, lawyer in the Reagan administration, the suspension of the writ of habeas corpus marks the emergence of executive power that is not bounded by law and unchecked by the legislature or judiciary. (Fein Interview) Fein was very adamant about the dangers of this happening in a democracy, and insistent that this is not compatible with the tenets of democracy. (Ibid)

The Bush II administration's establishment of the GITMO detention camp followed Koh's pattern of executive initiative, congressional acquiescence, and judicial tolerance (although the judiciary eventually began

to rule against the Bush II administration after lawyers for the detainees pressed cases). The Bush White House claimed unilateral authority to detain men indefinitely due to increased executive powers during wartime. In addition, it also used the Authorization for Use of Military Force to ague that Congress had given the President the power to detain combatants. With both houses of Congress under Republican control from the midterm elections of 2002 until the midterm elections of 2006, it is not surprising that Congress went along with the Republican executive's agenda. As explained in chapter 3, individual members of Congress usually perceive nothing to gain, and much to lose, in objecting to the President's agenda when that President is also their party's leader. As Savage noted, there is a "bipartisan history in which lawmakers from presidents' own parties have tended not to object to invocations of executive power." (Savage, 2012)

The judiciary, however, gradually began to disagree with some of the Bush II administration's legal positions in the war on terror, but only when specific cases actually made it into a court for adjudication. This took years. For example, in June 2004, the U.S. Supreme Court issued two rulings on the same day that began to curtail some aspects of the Bush II administration's legal strategies. In *Rasul v. Bush* (542 U.S. 466), the court ruled that U.S. courts did have the authority to hear habeas petitions from non-American detainees held in Guantanamo, despite the government's claim that the detention of captured combatants fell "squarely within the President's authority as Commander-in Chief" and thus fell outside of the court's jurisdiction.

In the second case, *Hamdi v. Rumsfeld* (542 U.S. 507), the Supreme Court ruled that even though the government had the power to detain **unlawful combatants**, detainees who were U.S. citizens had to be given the ability to challenge their detention before an impartial judge. Eight out of the nine judges agreed that the executive branch did not have the power to hold a U.S. citizen indefinitely without basic due process rights enforceable through judicial review. The Bush II administration struggled to enact military commissions that would assess the detainee's imprisonment in a manner that was consistent with the U.S. Constitution and existing laws. The problem was the unwillingness of some in the administration to give full due process rights to detainees outside the U.S. Advocates of the New Paradigm espoused a legal philosophy that, in essence, allowed the executive a great deal of leeway in fashioning detainee policy without any checks or balances from the other branches of government. (Fein Interview)

Two years later, in 2008, the Supreme Court issued another ruling that ran counter to the administration's preferred legal reasoning; in *Hamdan v. Rumsfeld* (548 U.S. 557) the court said the military commissions established by the administration to try detainees at Guantanamo violated both the Uniform Code of Military Justice and the Geneva Conventions. Once again, a majority of justices on the Supreme Court disagreed with the Bush II administration's legal reasoning and ruled in favour of the Guantanamo detainees. Predictably, the dissenting judges were Justices Scalia, Thomas, Roberts, and Alito, the last two having been appointed by George W. Bush. Over 21 amicus briefs were filed in support of the detainees' rights while just four briefs supported the administration's position. This represents the

gradual evolution in the legal community about the administration's rationale for holding detainees in Guantanamo; over time, more and more people came to question its legality and the failure to try captives in a fair and timely manner eroded the public's trust in the Bush administration's system. The Obama administration's handling of Guantanamo will be discussed in the chapter on the legacy of George W. Bush.

This brief review of the Bush II administration's New Paradigm on extraordinary rendition, ghost detainees, and the rights of other detainees reveals several important points about how this administration was different than previous administrations. First, no previous administration had a vice president like Cheney who was intent on expanding executive power even before 9/11 and no previous vice president's office employed so many like-minded adherents to Cheney's agenda. Cheney and a small group allied with him consistently worked to implement the New Paradigm for the WOT. Although the Reagan administration declared a war against terrorism in the 1980's, it did not claim the President had authority as the Commander-in-Chief to take many of the "wartime" actions George W. Bush took, such as suspending the Geneva Conventions. Moreover, international terrorism and the threat from al Qaeda were presented by the second Bush administration as a continuing crisis, directly threatening the national security of the U.S., as the Soviet Union once did. The threats transformed into political instruments wielded by the Republican Party to question the Democrats' commitment to U.S. national security. This politicization of national security effectively silenced much dissent, so it was not surprising that the Republican controlled Congress did not conduct oversight of many of the activities of the executive

branch from 2002 to 2006, and the Democrats in Congress went along with the Bush II agenda. Finally, the second Bush administration built on a foundation erected by the previous four administrations but close analysis of the details reveals it went further and set new precedents regarding the use of force.

In his book, *In My Time*, Cheney discussed the need for "enhanced interrogation methods" on detainees who would not disclose vital intelligence. According to Cheney, "Since the beginning of the enhanced interrogation program, the CIA had briefed key members of Congress on the interrogations and on what they were learning. I do not recall in any of the briefings I attended a single member objecting to the program or urging that we stop using these authorized, legal methods." (Cheney, 2011: 360) Former officials in the second Bush administration sustain the narrative that the practices of the administration, although controversial, were legal but Congress has never fully investigated and publicly revealed all that transpired during the WOT. It will be left to future historians who have access to all the currently classified information to assess the veracity of Cheney's claims that the New Paradigm was entirely lawful.

Afghanistan

After the shock of the 9/11 attacks, the Bush administration quickly decided that a muscular, military response was necessary. In his short address to the nation the evening of 9/11, George Bush did not mention Osama Bin Laden by name but he did give this as a reason for the attacks, "America was targeted for attack because we're the brightest beacon for

freedom and opportunity in the world." During the memorial service at the National Cathedral on September 14, Bush stated that America's "responsibility" after the attacks was "to rid the world of evil," a phrase that evokes images of Wilson's call to make the world safe for democracy. The President and his advisors soon began using the discourse of *war* to indicate how the U.S. would respond to the largest terrorist attack on American soil. According to one administration insider, the choice to proceed with the "war" paradigm instead of criminal law was self-evident because "if only the military has the capability to do what must be done, such as destroying enemy camps in Afghanistan, and it is sent to do it, then it is war." (Yoo, 2006: 10) The Reagan administration talked of a "war" against terrorism (although it actually resorted to the use of force infrequently), but the Bush II administration was determined from the start to pursue a real war against al Qaeda and all other groups the administration deemed might threaten the security of the U.S. The actual wisdom of this approach was not debated in Congress at the time although Congress is tasked with the responsibility of declaring war.

As outlined in chapter 3, Congress has the power to declare war and to raise and fund the armed forces according to the U.S. Constitution. Most scholars accept that the President has the power to repel sudden attacks against the U.S. and its armed forces, but agreement ends there. What the Bush II administration did after 9/11 was enact an extreme agenda for the use of force that entailed little role for the Congress or the courts; this followed the pattern articulated by Koh of executive initiative, congressional acquiescence, and judicial tolerance.

The U.S. intelligence community quickly identified bin Laden and the al Qaeda network as the perpetrators and within a week, Bush was meeting with his National Security Council at Camp David to plan the invasion of Afghanistan; it was September 15, 2001. According to Rumsfeld's memoir, Deputy Secretary Wolfowitz "helped conceptualize the global war on terrorism as being broader than just Afghanistan." (Rumsfeld, 2011: 359) The option of attacking *Iraq* was raised at the same meeting. (Ibid) It was evident that the President wanted to start with Afghanistan but was already contemplating military action against Iraq. By September 17, President Bush was directing the Pentagon to begin planning for an invasion of Iraq and Wolfowitz was publicly discussing the odds that Saddam Hussein was implicated in the 9/11 attacks, even though none of the counterterrorism experts in the administration could find a link between Hussein and 9/11. (Bergen, 2011: 56) Much of the Bush II administration's belief in Iraqi involvement in the 9/11 attacks stemmed from Mylroie's book entitled *Study of Revenge: Saddam Hussein's Unfinished War Against America* that placed Hussein at the centre of most important sources of terrorism against the U.S. The neoconservatives' long quest to get rid of Saddam Hussein is discussed further in the section on Iraq.

Less than one week after the attacks, the Bush II administration quickly worked out legislation with the leaders of Congress granting the administration authority to use military force against "those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against

the United States by such nations, organizations or persons." (AUMF, 2001) Several things are notable about the Authorization for Use of Military Force (AUMF 2001) including the speed with which it was passed in Congress; there were no committee hearings and only one representative voted against the legislation in the House. The vote in the House was 420–1 and the vote in the Senate was 98-0. The AUMF was the first time Congress authorized the President to use force against *organizations or persons*, and not only nations. Although the White House press office statement on the AUMF said the president was "gratified that Congress has united so powerfully by taking this action," the administration's legal team actually believed it was unnecessary because the "commander in chief already had the power on his own to decide whether to take the country to war over the attacks." (Savage, 2007: 120)

In addition, the AUMF was later cited by the Bush II administration for some questionable legal theories and practices; for example, the administration used the AUMF as justification for military commissions at GITMO, a claim rejected by the Supreme Court in *Hamdan v. Rumsfeld*. In 2006, the Court held in *Hamdan* that the military commissions established by the Bush II administration violated both the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions. The Bush II administration also claimed, after news reports of domestic wiretaps without warrants appeared in 2005, that the AUMF gave the National Security Agency the power to engage in domestic surveillance in violation of the Foreign Intelligence Surveillance Act (FISA). As Cheney articulated it, the president "was granted authority by the Congress to use all means necessary to take on the terrorists, and that's what we've done." Tom Daschle, Senate majority

leader when the AUMF was passed, wrote later that Congress never intended to grant the executive branch all the broad powers it later exercised, including the power to wiretap Americans without warrants, despite subsequent claims by the Bush II administration. (Daschle, 2005) Although the domestic surveillance claim generated controversy, it has never been adjudicated by the Supreme Court.

According to Donohue, the dynamic at work after a major terrorist attack in a democracy such as the U.S. or UK can best be described as a "spiral" (not a pendulum), meaning that public sentiment after an attack favours strong measures against terrorism and the executive branch, which is responsible for national security, seeks the broadest powers possible. (Donohue, 2008: 335 and Donohue Interview) Congress, instead of acting as a check on executive power, enables the executive by passing strong counterterrorism measures and those who oppose the measures are labelled as "weak" on terrorists. Later, those who advocate repealing strong counterterrorism measures bear the burden of proving that no political violence will follow repeal, or that *some* violence of this nature is acceptable. The legislature is the "crucial player" in this spiral for it has the ability to demand that the executive use all powers granted to it appropriately. (Ibid) In addition, counterterrorist measures intended to apply only to political violence may be applied to other aspects of criminal law, thereby enlarging the reach of counterterrorism laws. The passage of the AUMF in September 2001 (and the subsequent passage of the Patriot Act in October 2001) conforms to the "spiral" described by Donohue and illustrates the dangers of quick passage of

counterterrorism measures proposed by an executive eager to expand its authority.

In his speech to Congress on September 20, Bush once again emphasized that an *act of war* rather than an enormous act of terrorism had been committed, stating, “On September the 11th, enemies of freedom committed an act of war against our country.” He also referenced the notorious ideologies of the 20th century, communism, fascism, and Nazism, and the role the U.S. played in helping to defeat them, thereby insinuating that al Qaeda was as great a threat to national security as these had been once. This would not be the only time that the administration conflated the threat from a transnational terrorist group with the threats once posed by Nazi Germany, Imperial Japan, and the Soviet Union. One Bush II administration lawyer noted that right after September 11, the administration decided **without debate** that the criminal justice system was not sufficient to handle the terrorist threat. According to this insider, “There was a consensus that we had to move from retribution and punishment to preemption and prevention. Only a warfare model allows that approach.” (Mayer, 2009: 64) Thus, from the very beginning the Bush II administration clearly and consistently portrayed the 9/11 tragedy as warfare which eased public acceptance of its response, i.e. the use of military force and the announcement of a “war on terror.”

Despite this announcement of a war on terror, at least two former members of the administration acknowledge that the word “war” was neither particularly accurate nor effective. In interviews, both Paul Pillar and

Lawrence Wilkerson discussed a more nuanced view of the war versus crime dichotomy. For instance, Pillar stated, "there is no benefit to the rhetoric of a war on terror." It creates "semantic confusion" and it "overemphasizes the military." (Pillar Interview) For Pillar, former deputy chief of the counterterrorist center at the CIA, the "war versus crime talk is a lot of propaganda" because terrorism is both a crime and warlike. (Ibid)

In another interview, Wilkerson, former chief of staff to Powell, explained that counterterrorism actions involving the military are not really a war, nor are they a "classic covert operation." Instead, they are something "in between," a type of hybrid operation. (Wilkerson Interview) He added, "in essence, I'm saying that the military can be useful against terrorism, but it needs to be the last resort." (Ibid) Both men indicated that using the military in counterterrorism had practical constraints such as the difficulty of finding appropriate targets and the possibility of collateral damage. Nevertheless, the lawyers in Cheney's office and at the OLC proceeded with an agenda for the WOT that stressed the laws of war, the methods of warfare, and maximized the administration's options in pursuit of its war based on the President's Commander-in-Chief powers.

The Bush II administration took legal steps in September 2001 to lay the groundwork for a "war on terror" that would be fought without too much congressional oversight or public inquiry. For example, John Yoo, a proponent of the unitary executive theory, wrote a secret memo dated September 25, 2001 on the president's constitutional authority to conduct military operations against terrorists and nations supporting them. Yoo cited

Reagan's 1986 bombing of Libya and Clinton's 1993 bombing of Iraqi Intelligence Headquarters and 1998 cruise missile attacks in Afghanistan and Sudan as support for the proposition that the president has broad unilateral authority to use force against terrorists.

According to Yoo's memo, "Military actions need not be limited to those individuals, groups, or states that participated in the attacks on the World Trade Center and the Pentagon: the Constitution vests the President with the power to strike terrorist groups or organizations that cannot be demonstrably linked to the September 11 incidents, but that, nonetheless, pose a similar threat to the security of the United States and the lives of its people, whether at home or abroad." (Greenberg and Dratel, 2005: 3-24) In a footnote, Yoo added that "in the exercise of his plenary power to use military force," the president's decisions were unreviewable, i.e. not subject to either congressional or judicial oversight. (Ibid) Yoo's September 25, 2001 memo was kept secret until December 2004, after George W. Bush had been re-elected to a second term. Thus, the Bush II administration expanded presidential powers by secret memos that enabled the executive branch to determine on its own to use the American armed forces against any terrorist organization that posed a threat to the security of the U.S. *without supervision or check* by the other branches of the government.

Another important legal document enacted in the autumn after 9/11 but *not* secret was the USA Patriot Act signed into law by President Bush on October 26, 2001. In an effort to show bipartisan resolve in the face of international terrorism, Congress quickly passed the huge Patriot Act six

weeks after 9/11 with wide majorities, i.e. the Senate approved it by a vote of 98 to 1, and the House approved it by 357 to 66 votes. Like other counterterrorism laws enacted in democracies hit by a major terrorist attack, many of the sections of the Patriot Act contained sunset provisions. In the case of the Patriot Act, the provisions were set to expire on December 31, 2005. In her study of U.S. and UK counterterrorism laws, Donohue evaluated the effectiveness of sunset provisions and noted that they foster an "illusion of control" over what the executive is doing, but they should be the option of last resort. (Donohue, 2008: 338) Instead, obligatory reporting requirements are better at safeguarding civil liberties and ensuring the executive is held accountable for the implementation and operation of its counterterrorism laws. (Ibid)

The Patriot Act soon generated criticism from many different groups and came to symbolize lost civil liberties in the WOT. The Bush II administration discovered that its reauthorization was more difficult than original passage but the White House finally succeeded in getting the Congress to reauthorize it on March 9, 2006. The USA Patriot Improvement and Reauthorization Act contained sections requiring the Justice Department to make "regular and comprehensive reports to congressional oversight committees about how it was using its expanded powers." (Savage, 2007: 229) The irony was that after President Bush signed the bill, he issued a signing statement that substantially altered these reporting requirements. According to the signing statement, the president would construe the provisions of the bill that "call for furnishing information to entities outside the executive branch. . . . in a manner consistent with the President's

constitutional authority to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties." (President's Statement, 2006) In other words, the President was not bound to obey the reporting requirements of the reauthorization bill. Although several members of congress protested when this signing statement surfaced, nothing substantial was done to limit that power of the executive branch.

Application of Force

Al Qaeda, formed in 1988, announced its "war" against the U.S. on August 23, 1996 when bin Laden issued a public statement after he was expelled from Sudan. It was entitled, "Declaration of war against the Americans occupying the land of the two holy places," and in it bin Laden expressed his anger at the US for being expelled from Sudan. (Bergen, 2011: 22) Bin Laden and his followers were angered by the presence of U.S. troops in Saudi Arabia and found support among a population of young people in the Middle East who felt marginalized. Very few Americans realized it in 1996, but al Qaeda considered itself at war with the world's superpower and the reciprocal declaration of war by the Bush II administration after 9/11 must have been satisfying for bin Laden; at last the "far enemy" (the U.S.) he had been plotting against understood al Qaeda's potential for inflicting damage and was treating the terrorist group as combatants. Over the years, analysts have pondered whether according such treatment to al Qaeda was in the best interests of the U.S., as it elevated the group and bestowed on its members

the status of warriors, instead of mass murderers. Moreover, as one security expert noted, al Qaeda "positively seeks increased confrontation as a means of greatly increasing support" for its goals. (Rogers, 2004: 196)

The use of force in Afghanistan was justified by article 51 of the UN Charter, which permits individual and collective self-defence; on September 12, the UN Security Council passed Resolution 1368 condemning the attacks as a threat to international peace and security. On September 28, the Security Council passed Resolution 1373, which called on states to suppress the financing of terrorist acts and accelerate the exchange of information on the "threat posed by the possession of weapons of mass destruction by terrorist groups." After the attacks of 9/11, the international consensus permitted a strong American response and given the pre-existing foreign policy orientation of the Bush II administration, no one was surprised when the U.S. resorted to force against the Taliban regime. The original war plan relied on a CIA strategy of mobilizing local militias comprised of many Uzbek and Tajik fighters who opposed the ultra-religious Taliban. The plan called for a light U.S. footprint in the first insertion of American troops in the war on terror.

The Bush II administration began its campaign against the Taliban government at the end of September 2001 when a small team of CIA officers arrived in the country; shortly thereafter, on October 7, the U.S. began bombing. The plan for eliminating the Taliban entailed the use of American Special Forces to locate targets, strategic bombers to destroy Taliban facilities, and an alliance with local anti-Taliban militias known as the Northern Alliance. (Rogers, 2008: 163) There was a rapid advance on Afghan cities

and the Taliban left Kabul on December 7. Taliban fighters melted into the landscape rather than risk making a stand and being destroyed by the conventional American forces. As a result of this tactic, the U.S. was unable to capture many Taliban leaders because they escaped through the porous border into Pakistan. For instance, Mullah Muhammad Omar, the reclusive Afghan Taliban leader, has never been captured despite a large and intensive manhunt. The U.S. was successful, however, in killing al Qaeda's military commander, Mohammed Atef, in the first weeks of November 2001 by sending an armed drone to destroy the safe house where Atef was hiding. As the war on terrorism progressed and al Qaeda and Taliban members melted into the rugged terrain of Afghanistan and Pakistan, the U.S. began to use more armed drones to kill those suspected of terrorist activity.

In December 2001, Osama bin Laden escaped at the Battle of Tora Bora; according to Bergen, this was "the last, best chance to capture bin Laden and his top deputies." (Bergen, 2011: 79) The battle, from December 12 to 17, illustrated the less effective elements of the American strategy of maintaining a small presence in Afghanistan. The Pentagon was reluctant to send more ground troops into the battle in the mountains of Tora Bora because of several factors: fear of repeating the mistakes of the Soviet army when it occupied Afghanistan in the 1980's, an unwillingness to incur more American casualties, and the difficulty of fighting in the mountainous terrain in the winter. The U.S. was relying on the local Afghan warlords and their militias, along with the Pakistani army on the other side of the border, to seal the Afghan-Pakistan border. The failure to send in more US ground troops meant that bin Laden and other influential members of al Qaeda and the

Taliban fled into Pakistan and were able to begin rebuilding the network. Many of those captured and taken into U.S. custody at GITMO were low-level fighters, not the leadership. (Rogers, 2004: 101) The Bush II administration appeared almost as reluctant to risk American lives in combat as the Clinton administration had been in humanitarian missions.

Despite the failure to capture bin Laden and Mullah Omar, the U.S. strategy in Afghanistan appeared in early 2002 as a huge success, particularly when compared with the long Soviet experience in the same country. The Taliban were routed by "little more than 100 CIA agents and 300 special forces troops." (Murden, 2009: 87) The number of Afghan civilians killed is unknown but estimated at over 1,000 with only two U.S. forces killed by January 2002. The model used by the Pentagon and CIA in Afghanistan seemed to ensure swift success with minimal losses and it acerbated the trend in the Bush II administration to move on to other issues and states in the WOT, i.e. regime change in Iraq. Close examination of the historical record reveals the administration moved human resources and material into the war in Iraq without ensuring that stability and development projects in Afghanistan were completed.

A familiar pattern began to emerge in the first months of the U.S. occupation of Afghanistan, a pattern described by Bush himself during a speech in April 2002. Bush spoke of the "history of military conflict in Afghanistan. It's been one of initial success, followed by long years of floundering and ultimate failure. We're not going to repeat that mistake." Bush realized that the Afghans had been neglected in previous administrations, including his father's, after the Soviets left in 1989 and

American attention turned to more compelling problems. (Coll, 2004) Although the younger Bush depreciated the value of "nation building" during the election campaign against Gore, he now promised to do just that after the US ousted the Taliban. Despite his pledge to enact a new "Marshall Plan" for Afghanistan, the U.S. did not commit significant resources to the country; by 2007, the U.S. spent an "average of $3.4 billion a year reconstructing Afghanistan, less than half of what it spent in Iraq." In addition, in 2002 the U.S. did not want other states to send security forces so the 4,000 men in the international peacekeeping force (ISAF) stayed in Kabul while the U.S. force of 8,000 was intended to hunt Taliban and al Qaeda, not engage in peacekeeping or reconstruction. Thus, the original U.S. counterterrorist plan for Afghanistan, in spite of rhetoric calling for a new "Marshall Plan," centred on killing or capturing the remaining al Qaeda and Taliban forces.

Hamid Karzai, a Pashtun leader, was chosen as the interim head of Afghanistan on December 22, 2001 in Bonn at an international conference organized to establish a political framework for the country. In June 2002, a tribal *loya jirgah* selected Karzai as interim president and two years later, in January 2004, another *loya jirgah* approved a new constitution and parliament for Afghanistan. (Murden, 2009: 90) When Karzai won the elections for president in September 2004 with 55.4 percent of the vote, it appeared that the transition to democratic and liberal political institutions was well underway. However, the reality was less certain as the appearance of democratic institutions disguised the "continuance of older and deeper governance structures." (Murden, 2009: 91) One recurring problem for Afghanistan was warlordism, which thrived in the countryside due to a weak government in

Kabul and with a security vacuum outside the main capital, warlords, drug smugglers, and remnants of the Taliban were slowly able to re-emerge. The Afghan National Army and police were gradually trained to enhance security but without adequate supervision, some of these forces engaged in corruption and opium smuggling.

By March of 2003, the Bush II administration turned American attention to the invasion of Iraq. The situation in Afghanistan continued to drift backwards towards warlordism, while foreign aid trickled in, and foreign aid workers struggled with reconstruction and development. According to several accounts, more resources and trained personnel were earmarked for use in Iraq than Afghanistan after "Operation Iraqi Freedom" began. (Bergen, 2011) American aid to Afghanistan dropped to $3.1 billion in 2006 at the same time that violence against aid workers increased. In July of 2006, responsibility for security was given to NATO although the U.S. and NATO disagreed over strategy; the Americans wanted more emphasis on confronting the remaining Taliban while NATO countries faulted the U.S. for its insufficient reconstruction efforts. The uncertainty regarding the chain of command in Afghanistan hindered effective action and was not resolved until the summer of 2008 when General David McKiernan became commander of all U.S. and NATO forces. (Bergen, 2011: 190)

In addition to the lack of adequate resources for reconstruction and development, there were other factors behind Afghanistan's slide towards lawlessness and warlordism. One of the most significant was Pakistan's role as regional power broker and its long relationship with the Taliban. The

complicated relationship between the U.S. and Pakistan is marked by mutual distrust and concern over nuclear proliferation; since Pakistan first tested a nuclear weapon in May 1998, the U.S. and India have watched warily as Pakistan increased its nuclear stockpile. When General Pervez Musharraf led a coup in October 1999 that deposed the civilian government, the Clinton administration advocated a return to civilian rule and distanced itself from the Musharraf regime. Pakistan was one of the few supporters of the Taliban government in Afghanistan prior to 9/11 but the attacks radically altered the security equation for Pakistan and the U.S. George W. Bush and his advisors were adamant that support for the Taliban would not be tolerated by the U.S, so Musharraf became an American ally in the WOT. Thereafter, Bush spoke of Musharraf and his regime as "friends" and Pakistan was rewarded with a huge increase in American aid. However, it is an enduring irony of the Bush II administration's war on terror that the U.S. has been using force in the form of armed drones to target insurgents inside the territory of its avowed ally, Pakistan. (The drone war is described more fully in the section on drones.)

Despite the official designation of Pakistan as an ally in the WOT, many American analysts question whether the Pakistan military and the ISI (the Pakistani Intelligence Service) in particular, have done as much as possible to track down Taliban and al Qaeda militants hiding in the Federally Administrated Tribal Areas (FATA) of Pakistan. Bergen depicts a U.S. military official as using the term "schizophrenic" to describe Pakistani cooperation in the WOT in that sometimes the Pakistani military gave the U.S. invaluable information to track down al Qaeda leaders. At other times, there is substantial evidence that some Pakistani officials "tolerate and/or maintain

links with certain Taliban leaders." (Bergen, 2011: 186) In examining the Taliban resurgence in Afghanistan, Rumsfeld noted in his book, 'The central problem was the sanctuary Pakistan provided for the insurgents." (Rumsfeld, 2011: 688) The mainly Pashtun Taliban went to religious schools in Afghanistan and have substantial ties to the Pakistani military. The border between Afghanistan and Pakistan has never been completely sealed and Islamabad has never completely controlled the FATA, enabling both al Qaeda and Taliban militants to move across with weapons and other aid. By using the tribal areas in Pakistan as a place to hide and regroup, the Taliban were able to filter back into Afghanistan to mount campaigns against the U.S. and NATO forces.

As the security situation in Afghanistan deteriorated, some analysts began to speak of an "insurgency" in the countryside and to advocate adapting tactics more appropriate to asymmetrical warfare; counterinsurgency or COIN tactics became popular. The Taliban and al Qaeda, cognizant that striking the American and NATO forces in a direct, conventional manner was unlikely to succeed, applied the time-honoured tactics of insurgents. The "American way of war" against them was counterproductive when it involved an aggressive, offensive style in combat, a focus on firepower, and an emphasis on technology. Specifically, the American military's heavy reliance on firepower tended to cause civilian deaths and increased resentment against the U.S. and its allies, while the emphasis on technology meant American troops were not in close contact with the local populations and were thus unable to distinguish between friend and foe. Initially grateful for the overthrow of the ultra-strict Taliban, many civilians in Afghanistan gradually

started to resent the occupation of the country by foreign troops who appeared to use excessive force indiscriminately.

In an effort to adapt to the realities of insurgents in Iraq and Afghanistan, the Pentagon evaluated the work of an Australian army officer, Dr. David Kilcullen. Kilcullen, Chief Strategist in the US Department of State in the office of the Coordinator for Counterterrorism in 2005-2006, wrote extensively on the notion of a global insurgency that required new tactics. One of his influential papers, *Countering Global Insurgency*, argued that a new strategic approach to the WOT was necessary. In addition, he conceptualized the WOT "as a global insurgency, initiated by a diffuse grouping of Islamist movements that seek to re-make Islam's role in the world order. They use terrorism as their primary, but not their sole tactic." (Kilcullen, 2005) The best method of defeating this global jihad was therefore "counterinsurgency rather than traditional counterterrorism." (Ibid.) Kilcullen's counterinsurgency concepts made increasing sense to some members of the Bush II administration who witnessed the initial conventional military victories in Iraq and Afghanistan deteriorate into small-scale warfare. At the end of 2006, Kilcullen was seconded to work on specialized aspects of the counterinsurgency program with General David Petraeus' staff. Petraeus had been the commanding officer in Mosel, Iraq in 2003 and his success at COIN, by focusing on protecting the civilian population, starting public works projects, using minimal force, and enhancing security, made him stand out among the occupation troops in Iraq. By 2006 most of the U.S. army was trying to apply Petraeus' approach to the rest of Iraq in an effort to suppress the insurgency there. The U.S. experience with counterinsurgencies in Vietnam remains a

particularly bitter one so there was resistance to using counterinsurgency strategies in the WOT. However, events on the ground in both Afghanistan and Iraq required the Pentagon to rethink its initial analysis and adapt.

According to the field guide on counterinsurgency written by General David Petraeus, “a counterinsurgency campaign is a mix of offensive, defensive, and stability operations conducted along multiple lines of operations. It requires Soldiers and Marines to employ a mix of familiar combat tasks and skills more often associated with nonmilitary agencies. The balance between them depends on the local situation. Achieving this balance is not easy.” Kilcullen wrote one of the chapters in the field manual that discussed concrete steps for the U.S. military; he noted, “counterinsurgency is a competition to mobilize popular support,” so it was incumbent upon the U.S. to know the opinion makers in the countryside and to solicit their support. In addition, Kilcullen wrote that COIN operations “can be characterized as armed social work” and they include “attempts to redress basic social and political problems while being shot at.” This was clearly a long way from the “shock and awe” tactics that captivated American TV viewers as the Iraq invasion began in 2003.

As George W. Bush left office in January 2009, the conflict in Afghanistan continued; during his tenure, more than 630 American military forces died and more than 1,049 coalition troops died while the number of Afghan civilian killed is estimated in the thousands. The number of combatants in Afghanistan increased from a small contingent of special operation and CIA forces in the autumn of 2001 into much larger force of

36,000 American and 32,000 coalition troops by the start of 2009. President Obama has augmented the forces so that by 2011, there were 100,000 U.S. troops in Afghanistan. More fundamentally, the mission of the forces transformed from a kinetic, targeted effort to apprehend al Qaeda and remove the Taliban to an occupation force attempting to apply the counterinsurgency doctrines articulated by Petraeus and Kilcullen. The goal of a successful counterinsurgency campaign was complicated by various reports of accidental civilian deaths and troop misconduct. An egregious example occurred in 2010 when five U.S. soldiers from an Army Stryker brigade were charged with deliberately killing Afghan civilians for sport. The leader of the so-called "kill team," Staff Sergeant Gibbs, was convicted of murder and sentenced to life in prison. Other examples of unlawful civilian deaths complicated the counterinsurgency campaign and bolstered the Taliban's narrative.

Whether the cost to the U.S. and its coalition partners in terms of blood and treasure was worthwhile, particularly in light of the current economic recession, is controversial. Despite George Bush's pledge, Afghanistan remains a very impoverished country with ingrained problems of governance, stability, and security. Neglecting the Afghans does not appear to be an attractive option for the U.S. due to the possibility of Taliban resurgence and the dilemma posed by nuclear Pakistan. Although officially an ally of the U.S., Pakistan remains the source of much insurgent activity in the FATA and therefore, the American government believes it has the right, under article 51 of the UN Charter, to use force in Pakistan as a measure of self-defence. An overall assessment of the efficacy of the use of force to prevent terrorism in

Afghanistan and Pakistan follows in chapter 8. The next section examines how the Bush II administration extended its war on terror to Iraq.

Build-up to the War in Iraq

In sharp contrast to the use of force in Afghanistan, which was precipitated by the 9/11 terror attacks, the use of force in Iraq was the culmination of a series of policy choices and a public relations campaign designed to convince the public that Saddam Hussein was an imminent threat. As discussed below, prominent neo-conservatives were the ideological force behind the campaign, which began long before George W. Bush became president. By the time he gave a speech on national security to the graduates at West Point in June 2002, the war in Afghanistan looked like a mopping up operation and the neoconservatives in the Bush II administration were ready to eradicate other threats to American security. Years before Bush took office, they had decided that Saddam Hussein's regime in Iraq was an unacceptable threat to U.S. and Middle East security and the "war on terror" discourse that engulfed Washington policy-makers after 9/11 gave them the opportunity to enact their agenda. This section will examine the neo-conservative worldview and how it influenced the decision-making process in the build-up to the war in Iraq. It is clear from a close examination of the facts that without the significant input of the neo-conservatives and their allies within the Bush II administration, the invasion of Iraq in 2003 would have been unlikely.

Contemporary neo-conservatism contains strong elements of "Wilsonian ambition to spread democracy," coupled with an "emphasis on military power, exporting democracy and unilateralism." (Ritchie and Rogers,

2007: 143) Proponents of the neo-conservative worldview focused their attention on the Middle East which they theorized was best-suited to the spread of democracy; Iraq was viewed as the ideal place where democratic institutions and a free market economy could flourish as soon as the repressive, autocratic regime of Saddam Hussein was replaced. In addition, many neo-conservatives vigorously supported Israel as the best functioning democracy in the Middle East. Two related tenets of neo-conservative thought are important regarding the invasion of Iraq: the belief in American exceptionalism, and the notion that, unlike other counties in the past, the U.S. lacks imperial ambitions so a "benevolent imperium" based on American values would actually benefit the world community. (Ritchie and Rogers, 2007: 144) As a result of the neo-conservative influence in the Bush II administration, participation in multilateral institutions such as the UN was downplayed while the U.S. military was perceived as the most important tool of foreign policy.

During the Clinton administration, the neo-conservatives largely retreated to academia and the conservative think tanks of Washington, DC (for example, the American enterprise Institute and Project for a New American Century) where they continued to write and publicize their worldviews and preferred policies. They were critical of Clinton's preference for multilateral solutions and willingness to seek global consensus, which was viewed as indecisiveness or weakness. Clinton's policies of continued sanctions along with containment of Saddam Hussein's regime in Iraq were criticized as ineffective and throughout the 1990's the neo-conservatives advocated regime change as the best course of action to secure American

interests. Regime change in Iraq became official policy of the U.S. after Congress passed the *Iraq Liberation Act* by wide margins in 1998. The Senate approved it by unanimous consent and the vote in the House was 360 to 38. (Ritchie and Rogers, 2007: 41) When Clinton signed the bill into law at the end of October 1998, it signalled that his Democratic administration and the Republican Congress agreed on the policy goal of regime change in Iraq. The next question was how regime change should happen. For neo-conservatives, the way forward was simple: provide military support to the Iraqi opposition; Paul Wolfowitz, for instance, told the House of Representatives that if the Clinton administration could "muster the necessary strength of purpose," Saddam Hussein would be defeated. (Ritchie and Rogers, 2007: 48) For Clinton and his foreign policy advisors, including Madeleine Albright, the situation was more complex and required more nuanced policies than merely arming the Iraqi opposition to achieve regime change in Baghdad.

In an interview, Lawrence Wilkerson discussed how the Middle East has presented the U.S. with security dilemmas since at least 1979 when the Shah of Iran was deposed. He noted how the Iraq Liberation Act became law due to the combined efforts of the Republican controlled Congress and the Democratic administration of Clinton in 1998. According to Wilkerson, it took years of careful work and consistent campaigning by the neo-conservatives to ensure the Iraqi regime was perceived as a continuing and serious threat to the U.S. after the Iraqi defeat in the Gulf War in 1991. Reflecting on the contemporary situation with Iran, Wilkerson maintained that there were some in Congress working on an "Iran Liberation Act" that would make regime

change in **Iran** the goal of the U.S. (Wilkerson Interview) He cautioned against underestimating the neo-conservatives because of the following three characteristics: they have a "strategy," they are "ruthless in pursuing the strategy," and they are "experts at bureaucratic politics." (Ibid)

In January of 1998, the Project for New American Century (PNAC), a neo-conservative think-tank, sent a letter to Clinton urging the president to remove Saddam Hussein because "current American policy toward Iraq is not succeeding." The signatories noted that Iraq threatened American security and the security of American allies with WMD and they advocated, "a willingness to undertake military action as diplomacy is clearly failing." By March of 2003, eleven of the signatories of the letter held positions in the Bush II administration, including John Bolton, Donald Rumsfeld, and Paul Wolfowitz. In December 1998, Clinton launched Operation Desert Fox against the Hussein regime; the cruise missiles were intended to force Iraqi compliance with the UN weapons inspection regime. The UN weapons inspectors withdrew from Iraq shortly before the bombing began and did not return until November 2002, after Security Council Resolution 1441 was adopted. The neo-conservatives were never satisfied that the Clinton administration was implementing an effective, tough policy against Iraq, one that would result in regime change. When George W. Bush became president in January 2001, many of the same neo-conservatives who had criticized Clinton's perceived weaknesses joined the new Bush administration in positions at the State Department or Department of Defense, ready to enact a tougher line against Saddam Hussein.

As detailed in the section on Afghanistan, immediately after the terror attacks of 9/11, some in the Bush II administration and their allies suggested links between the attacks and Iraq. Laurie Mylroie, the author of *Study of Revenge: Saddam Hussein's Unfinished War Against America,* wrote an op-ed for the Wall Street Journal just two days after 9/11 in which she cast doubt on whether al Qaeda had acted without state support. According to Mylroie, "It does not make a great deal of sense to attribute to one man--Osama bin Laden--all the acts of terrorism which are regularly ascribed to him, including Tuesday's assault. It is time to take a new look at the major terrorists acts of terrorism directed against the U.S. in recent years. Are they, perhaps, more complicated than they seem? Indeed, *are they acts of war*, with all the complexity that wartime activities regularly involve?" (Mylroie, 2001) Thus, within days of 9/11, the discourse on terrorism as war instead of criminal behaviour, and the linkages between Saddam Hussein and support for international terrorism appeared in American newspapers and in the Bush II administration agendas. Moreover, the president's need to be perceived by the American electorate as responding strongly to terrorism coincided with the "neo-conservatives' long-desired goal of regime change in Baghdad." (Halper and Clarke, 2004: 205)

Within the Bush administration, a more muscular response to international threats was evolving as Bush's national security team, Rice, Powell, Rumsfeld, and Cheney, in particular, moved away from a security paradigm that placed major states such as China and Russia as the preeminent threats. In a *Foreign Affairs* article in 2000, Dr. Rice barely mentioned terrorism and to the extent she addressed it, it was in the context of

state sponsors of terror. (Rice, 2000) The possibility of a non-state terrorist network threatening the world's superpower with a large-scale attack like the 9/11 tragedy does not appear in her written work. Her performance as Bush's first national security advisor has been criticized by several analysts including one who wrote, "Rice has never really had the authority within the administration that a national security adviser should. Before September 11, she allowed Rumsfeld and other hawkish officials to make missile defense and the dissolution of the Anti-Ballistic Missile Treaty priorities." (Kurlantzick, 2004: 19) Her inability to mediate among competing views and then enforce the President's decision on a foreign policy issue resulted in strong personalities like Rumsfeld pursuing their own preferred policies.

Cheney organized his own national security advisors, many of whom were neo-conservatives and had served previously in government so they knew how to get their preferred policy enacted. Cheney's influence and powerful staff were discussed in a preceding section. In addition, Cheney and Rumsfeld had a long history of working together, beginning in the Ford administration, and they shared the same type of assertive nationalist worldview. At the CIA, Tenet was a holdover from the Clinton administration, but he depended upon George W. Bush's continued confidence to stay at his position, and, after the surprise attack of 9/11, sought to redeem himself and his agency.

At the State Department, Powell was neither a neo-conservative nor convinced that a stronger sanctions regime applied more consistently against Iraq would not work. According to Powell's chief of staff, Wilkerson, Powell

was hesitant to use force against Saddam Hussein again (recalling the difficulties in achieving political objectives after the first Gulf War) and presented a strategy for the war on terror that incorporated diplomacy and law enforcement, along with the military. (Wilkerson Interview) The goal was to decrease terrorism to manageable levels and build resilience in case of another attack. (Ibid) In Wilkerson's opinion, President Bush did not use Powell's ideas "because of Rumsfeld." (Ibid) Rumsfeld was opportunistic and the "politics of fear" played into his hands to ensure his preferred policy options, including the use of force in Iraq, became the President's preferred policy outcomes.

According to Paul Pillar, the decision by the Bush II administration to remove Saddam Hussein was driven not by the intelligence on WMD in Iraq, but by "other factors," such as "the desire to shake up the sclerotic power structures of the Middle East and hasten the spread of more liberal politics and economics in the region." (Pillar, 2006: 11) In an article in *Foreign Affairs*, Pillar argued that the administration "used intelligence not to inform decision-making, but to justify a decision already made." (Ibid) He notes that in October 2002, Congress, not the executive branch, requested a National Intelligence Estimate (NIE) on Iraq's weapons programs but "no more than six senators and only a handful of House members got beyond the five-page executive summary" of the classified document. (Ibid) According to President Bush's press secretary, the President himself selectively declassified the NIE so that the Vice President and Scooter Libby could leak information on Iraq's WMD program to the press. Parts of the 2002 NIE discuss "key judgments"

about WMD in Iraq and the level of confidence that the intelligence agencies have in their assessment. Listed under “low confidence” are the following:

- When Saddam would use weapons of mass destruction.
- Whether Saddam would engage in clandestine attacks against the US Homeland.
- Whether in desperation Saddam would share chemical or biological weapons with al-Qa’ida.

Pillar detailed how the Bush II administration used its preferred policy option of removing Saddam Hussein to drive the intelligence on WMD, and to aggressively “win public support for its decision to go to war.” In Pillar’s analysis, the greatest discrepancy between the administration’s public statements and the intelligence community’s assessments regarded “the relationship between Saddam and al Qaeda,” which was exaggerated to draw upon the public’s fears of more terrorist attacks.

Pillar’s explanations regarding pre-war intelligence on Iraq strike at the nerve in the centre of a controversy that has boiled since the failure to find WMD led people to examine the causes of the war. Members and supporters of the Bush II administration blame the pre-war intelligence estimates, and point out that much of the intelligence regarding Saddam Hussein and WMD was wrong. Opponents claim a close examination of the facts reveals that the administration manipulated the intelligence to hype the threat from Iraq, exaggerate contacts between Saddam Hussein and al Qaeda, and frighten the American public into supporting the invasion in 2003. After examining the

intelligence preceding the Iraq war, Phythian concluded, “there were two mutually reinforcing sets of failure with regard to Iraq’s WMD. One was a policy failure, the other an intelligence failure.” (Phythian, 2006: 420)

Several reports after the war such as the President’s *Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction* (Robb-Silberman commission) and the Senate Select Committee on Intelligence report entitled *U.S. Intelligence Community’s Prewar Intelligence Assessments on Iraq* are critical of the U.S. intelligence community for overstating the evidence of Iraqi WMD. (Ritchie and Rogers, 2007: 131) Yet another report, this one done by the Minority Staff of the Senate Armed Services Committee, *Report of an Inquiry into the Alternative Analysis of the Issue of an Iraq-al-Qaida Relationship*, claims the pre-war intelligence was exaggerated by Douglas Feith at the Pentagon in an effort to bolster support for the administration’s policy. (Ritchie and Rogers, 2007: 132) It is beyond the scope of this research to determine which report is most accurate. The proliferation of post-war reports analyzing the pre-war intelligence indicates that there is consensus that something went terribly wrong with the intelligence on Iraq.

2002 Speeches advocating the Use of Force

The articulation of a neo-conservative agenda to secure domestic, if not international, support for the use of force against Saddam Hussein’s regime can be chartered by examining key speeches made by President Bush and Vice President Cheney throughout 2002. The first key speech was Bush’s

January 29, 2002 State of the Union address to both houses of Congress in which he used the expression “axis of evil” to describe Iraq, Iran, and North Korea. Arguing that these regimes were arming themselves with WMD, Bush noted that time was not on America’s side. He then continued, “I will not wait on events, while dangers gather. I will not stand by, as peril draws closer and closer. The United States of America will not permit the world’s most dangerous regimes to threaten us with the world’s most destructive weapons.” (Bush, 2002a)) In the same speech, Bush praised the leadership of President Musharraf in Pakistan for “cracking down on terror.” (Ibid) The disconnect between praise of Musharraf’s undemocratic rule in nuclear-armed Pakistan and the dire warnings about hostile regimes with WMD did not disturb Bush’s speechwriter. Throughout Bush’s first term, he continued to praise Musharraf for help in the WOT while ignoring many of the undemocratic aspects of Musharraf’s regime. The “axis of evil” speech marked the beginning of the promotion of the Bush doctrine of preemption.

On June 1, 2002, President Bush gave a speech to the graduating cadets at the United States Military Academy at West Point; this was another opportunity to refine the Bush doctrine and put forth the arguments for preemptive action in the war on terror. Bush contrasted the situation prevailing during the Cold War, when the nuclear-armed superpowers struggled for dominance and the concepts of containment and deterrence kept the conflict manageable, with contemporary international threats. Bush noted “shadowy terrorist networks with no nation or citizens to defend” were not amenable to containment and deterrence. (Bush, 2002) Giving the rationale for preemption, Bush continued, “If we wait for threats to fully materialize, we

will have waited too long." (Ibid) He called on the cadets and all Americans to be ready for "preemptive action" and described the conflict as one "between good and evil." (Ibid) This speech incorporated the administration's security strategies with its doctrine of preemption. It also emphasized the administration's stark notions about good and evil, with the underlying implication that compromise, even negotiation, with evil was impossible. Finally, it was clear that the administration categorized Iraq as the next target in the WOT.

During the same period that President Bush was articulating the contours of the Bush doctrine, Vice President Cheney was warning Americans about the dangers of WMD in the hands of dictators, specifically, Saddam Hussein. At the end of August in 2002, Cheney appeared at the Nashville convention of the Veterans of Foreign Wars (VFW) and began hammering home the message that regime change in Iraq was not merely beneficial to the U.S, it was *essential* to its security. In Cheney's words, "Deliverable weapons of mass destruction in the hands of a terror network, or a murderous dictator, or the two working together, constitutes as grave a threat as can be imagined. The risks of inaction are far greater than the risk of action." (Cheney, 2002) He went on to dispute the critics' appraisals that regime change in Iraq could unleash anarchy or more tension in the Middle East. According to Cheney, "Regime change in Iraq would bring about a number of benefits to the region. When the gravest of threats are eliminated, the freedom-loving peoples of the region will have a chance to promote the values that can bring lasting peace." (Ibid) The Bush II administration consistently tied two elements together that autumn in the discourse on Iraq: spokespeople always insinuated an

operational link between Saddam Hussein and al Qaeda and WMD; and they always extolled the benefits to the greater Middle East of regime change in Iraq.

National Security Strategy 2002

In September 2002, the Bush II administration released its National Security Strategy (NSS) and the shift from deterrence to preemption was formalized in this document. According to Halper and Clarke, the NSS of 2002 was the first time that any U.S. President "set out a formal national strategy *doctrine* that included preemption." (Halper and Clarke, 2004: 142) The NSS bore some resemblance to an earlier document called the Defense Planning Guidance (DPG) which was written in 1992 for then Secretary of Defense Dick Cheney by some well-known neo-conservatives such as Paul Wolfowitz, Zalmay Khalilzad (who joined the Bush II National Security Council), and I. Scooter Libby (who became Cheney's chief of staff). When the draft DPG was leaked to the *New York Times* and *Washington Post*, it created a controversy as it incorporated many neo-conservative concepts for retaining U.S. power, including preventing the emergence of any new rival powers, establishing a new order dominated by the U.S, and maintaining this new order with *ad hoc* coalitions. (Ritchie and Rogers, 2007: 147) Early in 1992, the notion of the U.S. as a "benevolent global hegemon" as depicted in the DPG was badly received by the American public and members of congress and the first Bush administration subsequently "issued a revised, less provocative version." (Halper and Clarke, 2004: 145) The importance of the draft DPG is that it illustrates the tenacity of the neo-conservatives who

used their time outside of government after Clinton's election to refine their strategies for U.S. dominance and, ten years after the DPG, capitalized on the opportunity presented by George W. Bush to formalize the doctrine of preemption in the NSS of 2002.

The NSS of 2002 drew various criticisms on several levels, including its use of the concept of "preemption" which was broadened in the document to encompass prevention. Prevention, the use of force against adversaries without specific evidence of an *imminent* attack, was a bold assertion of power by the Bush II administration, and drew on the influence of neo-conservative ideology. Clinton's preference for multilateralism in resolving international problems was absent from the NSS of 2002. Preempting attacks by terrorist networks and rogue states was put forth in the NSS as part of a necessary element of U.S. security, but critics noted that conflating terrorists and rogue states was counterproductive as certain tools of statecraft (economic sanctions and diplomacy, for example) might work on the latter but not the former. Furthermore, the articulation of a right to preemption might work against U.S. interests if other states claimed the same right in their security strategies. (O'Hanlon, Rice, and Steinberg, 2002: 1) Overall, the NSS embraced the strategic thinking advocated by the neo-conservatives and promised a more robust assertion of U.S. power in order to spread American values all over the world. In short, the NSS was "an unabashed manifestation of well-documented neo-conservative thought." (Halper and Clarke, 2004: 146)

The Role of Congress

The importance of the context of the vote in Congress regarding the decision to invade Iraq needs to be highlighted to appreciate the role of timing. In the autumn of 2002, several key events occurred, including the release of the NSS in September and mid-term elections in November. The mid-term elections were the first congressional elections after the 9/11 attacks and the impact of a large-scale terrorist act on the electorate was unknown. In addition, traditionally, the president's party tends to lose seats in Congress after the mid-term elections, probably due to the electorate's disenchantment with the administration. President Bush and the Republican Party campaigned strenuously during the autumn of 2002, reminding voters of the need for a strong national security posture and implying that the Republicans were best able to provide that while keeping the focus on foreign, not domestic, issues. Moreover, the last Gallup poll before the election revealed that 63% of the American electorate approved of President Bush's performance as President. The November 5 elections resulted in Republican gains in the House of Representatives by eight seats. In the Senate, the balance of 50 Democrats (including one Democratic-leaning Independent) and 50 Republicans ended with the election of two Republicans, which gave the Republicans control of the Senate. Thus, after the mid-term elections of 2002, the Republican Party controlled both the executive branch and the legislative branch and the likelihood of more oversight of the war on terror diminished.

Less than one month *prior* to the elections, the House and Senate debated the Bush II administration's proposal for authorization to use military

force against Iraq. This debate contrasted sharply with the situation prevailing during the first Gulf War, when the first President Bush did not push Congress to vote on authorizing force against Iraq after Iraq invaded Kuwait. In fact, the first President Bush maintained that he did not need authorization from Congress to commit U.S. troops to war against Iraq but asked Congress anyway, as a curtsey to the institution. That vote took place well *after* the November elections, on January 14, 1991. In 2002, the younger President Bush and his administration exhorted members of Congress to vote *before* the mid-term elections as the threat from Saddam Hussein's Iraq was depicted as imminent and growing. The proximity of the 9/11 attacks and the 2002 mid-term elections infuenced the debate in Congress on whether the U.S. should use military force against Iraq and forms the background to the following discussion on the congressional debate. Another important step in the process of moving towards war with Iraq was President Bush's address to the UN on September 12, 2002, discussed below.

The House of Representatives began serious consideration of the Bush II administration's proposal for an Iraq war authorization on October 2, 2002. The administration argued that the President had a greater chance of securing "a tough UN resolution against Iraq" if there was bi-partisan support from Congress for the use of military force against the Hussein regime. (Ritchie and Rogers, 2007: 118) The next day, October 3, the Congressional Budget Office (CBO), pursuant to an order from the House Committee on International Relations, issued a cost estimate for the proposal. In their cost estimate, the CBO estimated that "prosecuting a war would cost between $6 billion and $9 billion a month----although we cannot estimate how long such a war may last."

The estimates for removing Saddam Hussein from power varied widely; former White House economic advisor Lawrence Lindsey gave an estimate of $100 to $200 billion, but this was strongly disputed by Bush II administration officials. Rumsfeld, for example, called this estimate “baloney” and many fellow neo-conservatives pointed out that Iraq was an oil-rich country that could pay for its own reconstruction. In the end, the projected costs of prosecuting a war against Iraq did not prevent members of Congress from voting for the Iraq war resolution, possibly due to the disputed nature of the estimates and strong denunciations of any high-end estimates by the administration. By March 2008, two noted economists, Stiglitz and Bilmes, put the total economic impact of the war to the U.S. at $4 trillion. (Herszenhorn, 2008).

In the House, Iraq war resolution was jointly sponsored by the Speaker, Republican Dennis Hastert, and the Democratic Minority Leader, Richard Gephardt from Missouri. Gephardt’s support for the administration’s proposal was crucial, as Gephardt was an influential member of the Democratic caucus. Moreover, Gephardt was planning on running for the Democratic nomination for the presidency in 2004. In his speech to the House, Gephardt maintained, “September 11 has made all the difference” regarding his analysis of the security situation in Iraq. He echoed the administration’s viewpoint that deterrence was not likely to work on Saddam Hussein and the compelling urgency of WMD in Iraq made action imperative. Most importantly, despite being the Democratic Minority Leader, Gephardt articulated the **same themes and fears** about terrorism, Saddam Hussein, and the nexus with WMD prior to the vote in the House on the Iraq war resolution. The most notable point of

dissention for Gephardt was his failure to endorse President Bush's policy of preemption. With many senior Democrats in agreement with the administration's assessment of the need to remove Hussein, those opposing the Iraq war resolution were weakened and unable to stop the measure from passing. On October 10, 2002, the House voted 296 to 133 to pass the resolution.

In the Senate, a similar dynamic took place as senior Democratic senators agreed with the administration that the combination of terrorism, rogue regimes like Saddam Hussein's, and WMD presented a security dilemma to the U.S. that made using force a viable and desirable option. In a letter to Senator Bob Graham, CIA Director Tenet repeated the administration's argument that the links between Saddam Hussein and al Qaeda posed a dangerous threat, noting that "We have solid reporting of senior level contacts between Iraq and al-Qaeda going back a decade." (Tenet, 2002) Potential Democratic nominees for the presidential run in 2004 like Senators John Edwards and John Kerry did not dispute the administration's version of the security dilemma. Instead, they implicitly acknowledged that fighting Iraq was central to the war on terror. This resulted in giving the initiative to the administration because once it was conceded that Iraq had (or would soon possess) WMD and that Iraq posed an imminent threat, it was impossible to argue effectively against the administration's proposal.

Senator Robert Byrd, Democrat of West Virginia, was one important dissenter from the administration's viewpoint and he spoke forcefully against the proposal on October 4. He explained he was "pained" to see the

Congress rush to pass the resolution immediately, to “get it behind us before the election.” (Byrd, 2002) He then warned that the Bush II administration wanted the Congress to “put its stamp of approval on that Bush doctrine of preemptive strikes.” (Ibid) Nevertheless, his ardent opposition to the proposal failed to move many senators and the Senate passed the resolution by a vote of 77 to 23 on October 11, 2002. President Bush signed it into law on October 16, 2002, making the invasion of Iraq appear inevitable, in the absence of serious UN or Iraqi efforts to advert the U.S. use of force.

The Authorization for use of Military Force against Iraq resolution of 2002 states in the preamble that Iraq “poses a continuing threat to the national security of the United States and international peace and security in the Persian Gulf region.” It also specifically included the Bush II administration’s claim that al Qaeda members “were known to be in Iraq.” Two other statements concerning Iraq and terrorism are part of the preamble: “Iraq continues to aid and harbor other international terrorist organizations, including organizations that threaten the lives and safety of United States citizens;” and the 9/11 attacks “underscored the gravity of the threat posed by the acquisition of weapons of mass destruction by international terrorist organizations.” Thus, the use of force against Iraq was skilfully tied to the 9/11 attacks and the threat of more terrorist attacks. The resolution then authorized the President to use the armed forces of the U.S. “as he determines to be necessary and appropriate” and states that it is specific statutory authorization within the meaning of the War Powers Resolution. The neo-conservatives had succeeded in making regime change in Iraq part of the national security strategy of the Bush II administration and the Bush II

administration had succeeded in convincing the Congress to pass an authorization for use of military force against Iraq in the absence of Iraqi complicity with the 9/11 attacks. Rather than act as a check on executive branch movement towards war, the Congress had facilitated it.

Bush Address to the UN

On September 12, 2002, one year and a day after the 9/11 attacks, President Bush went to the United Nations General Assembly in New York and described the security threat posed by Saddam Hussein's government. He also detailed the many UN Security Council resolutions, including ones on weapons inspections, which the Hussein regime had violated in the years since the cease-fire of 1991. Bush repeated the link between the Hussein regime and terrorist networks, saying, "In violation of Security Council Resolution 1373, Iraq continues to shelter and support terrorist organizations that direct violence against Iran, Israel, and Western governments." (Bush, 2002b) He characterized Saddam Hussein's regime as "a grave and gathering danger." In addition, President Bush claimed that if Iraq acquired "fissile material, it would be able to build a nuclear weapon within a year." (Ibid) In closing, President Bush challenged the UN to live up to its stated purposes and hold Iraq accountable by asking the UN, "Are Security Council resolutions to be honored and enforced, or cast aside without consequence? Will the United Nations serve the purpose of its founding, or will it be irrelevant?" (Ibid) Clearly, the themes the Bush II administration emphasized for the domestic audience, i.e. the links between Hussein and terrorists and

Iraq as an undeterrable security threat, were repackaged for the international audience at the UN.

In retrospect, it may appear odd that the Bush II administration articulated a widening of the war on terror to encompass Iraq when Osama bin Laden and other al Qaeda leaders were still at large and the war in Afghanistan continued, but the Bush II administration's push for an invasion of Iraq can best be comprehended as part of a neo-conservative agenda to remake the Middle East by spreading democracy. The administration was able to make Iraq part of an urgent agenda by emphasizing the danger of rogue states giving WMD to terrorists. After the 9/11 attacks, the American public, operating in an environment of continuing crisis, no longer doubted the ability of committed terrorists to kill thousands and the Bush II administration used this fear to connect the regime in Iraq with international terrorism. President Bush's speech to the UN was intended to rally support for the Bush II administration's position on Iraq, challenge the UN to take action, and make it clear to the world that the administration would take action **alone** if the world did nothing more to prevent Saddam Hussein from threatening the security of the U.S. The underlying assumption was that the U.S. had the right unilaterally to use force against Iraq on behalf of the international community.

The Bush II administration continued to build a case for invading Iraq to remove Saddam Hussein based upon the combined threats of WMD, terrorists, and rogue states---states that were beyond the ability of the U.S. to contain or deter. The threat from Iraq was always presented by notable Bush II administration officials such as Cheney and Rumsfeld as an urgent one.

Although the U.S. Congress was convinced that the use of force against Iraq was justified, much of the rest of the world was sceptical, but the initiative for action was with the Bush II administration. As some critics pointed out, allowing the UN weapons inspectors back into Iraq was not the preferred option of the neo-conservatives, but the Bush II administration went along with this, partially to retain crucial support from the British government. On November 8, 2002, the UN Security Council adopted resolution 1441, which established an enhanced weapons inspections regime for Iraq, but did not authorize the use of force to compel compliance. Resolution 1441 also specifically mentioned previous UN resolutions such as 687 that required Iraqi compliance. Regarding terrorism, resolution 1441 deplored the failure of the government of Iraq to comply with its commitments with regard to terrorism, but did not detail Iraqi non-compliance in this area.

As a result of resolution 1441, UN weapons inspectors returned to Iraq on November 25, 2002 and began the search for weapons. They found a "crate of warheads designed for chemical weapons" but no "smoking gun" to prove Saddam Hussein possessed banned weapons or the means to deliver them. (Ritchie and Rogers, 2007: 108) Nevertheless, the lack of hard evidence of Iraqi noncompliance did not halt the Bush II administration's campaign to achieve regime change in Iraq; instead, administration officials noted that the Iraqi regime was skilled in deception and evasion.

The rhetoric counselling the use of force to remove the regime and neutralize the imminent threat from Iraq continued unabated. For instance, in his State of the Union address on January 28, 2003, President Bush explained that, "We've got the terrorists on the run. We're keeping them on the run. One

by one the terrorists are learning the meaning of American justice." (Bush, 2003) He then went on to detail Iraqi deceptions about WMD and carefully linked the possibility of more terrorist attacks against Americans to Saddam Hussein. According to President Bush, "Evidence from intelligence sources, secret communications and statements by people now in custody reveal that Saddam Hussein aids and protects terrorists, including members of Al Qaeda. Secretly, and without fingerprints, he could provide one of his hidden weapons to terrorists, or help them develop their own. Before September the 11th, many in the world believed that Saddam Hussein could be contained. But chemical agents, lethal viruses and shadowy terrorist networks are not easily contained." (Ibid) The President then continued to link Saddam Hussein with terrorism and asked, "Some have said we must not act until the threat is imminent. Since when have terrorists and tyrants announced their intentions, politely putting us on notice before they strike?" (Ibid) The public discourse on Iraq, far from advocating patience with the UN weapons inspection system, was clearly combining the threats of rogue regimes, WMD, and terrorism.

The other notable statement from the State of the Union in 2003 was, "The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa." (Ibid) This assertion, later proven false, formed the core of the Valerie Plame scandal, discussed in the section above on the New Paradigm for the WOT. Its inclusion in Bush's State of the Union address reflected an administration ready to present any claim, however unproven, to bolster its case that the threat posed by Iraq was imminent, growing, and not subject to containment or deterrence.

Powell Presentation to the UN

On February 5, 2003, Secretary of State Powell went to the UN Security Council and laid out the case against Saddam Hussein's regime with many sources of U.S. intelligence. Many assertions cited by Powell as positive proof of Iraqi noncompliance with UN norms later proved to be false and Powell himself regretted the "flaws" in the speech. Lawrence Wilkerson, his chief of staff, later called the speech "the lowest point in my life" because so many of the American assertions, presented as fact, were false. (Wilkerson Interview) Wilkerson described spending four days and nights in a CIA conference room with Powell and Tenet and other administration officials, trying to ensure the accuracy of Powell's presentation. (Ibid) However, some of the assertions were based on faulty intelligence including, for example, Powell's argument that Iraq possessed mobile bioweapons laboratories mounted on trucks. Subsequently, it was revealed that this information came from an informant, Rafid Ahmed Alwan al-Janabi known as "Curveball," who had been flagged by the Defense Intelligence Agency (DIA) as a fabricator. Another false evidentiary element mentioned by Powell was a "fine paper that the United Kingdom distributed yesterday, which describes in exquisite detail Iraqi deception activities." (Powell, 2003) This turned out to be a British dossier on Iraq that contained intelligence "taken from published academic articles, some of them several years old." (Lashmar and Whitaker, 2003: 480) Despite the fact that much of the "evidence" provided by Powell at the UN later turned out to be false, at the time of his presentation, it was a dramatic rhetoric challenge to the world to viscerally see and hear "proof" of Iraqi WMD and then be asked to do something about it.

Powell used slides, tapes, and charts during his speech at the UN to augment his argument that Saddam Hussein was a growing, unique, and uncontainable threat to the US and the world. Saddam Hussein's disregard of UN resolutions and attempts to acquire WMD in contradiction to the sanctions regime formed the first part of Powell's speech. When Powell began discussing the nexus of international terrorism and Saddam Hussein, he claimed, "Iraq and terrorism go back decades." (Powell, 2003) He then described the nexus between Iraq and al Qaeda member Abu Musab Al-Zarqawi, who had fought the Soviets in the Afghan war and established an explosive training camp in north-eastern Iraq. Powell described the training camp and the terrorist organization, Ansar al-Islam, that operated there and admitted the area was "in northern Kurdish areas outside of Saddam Hussein's controlled Iraq." (Ibid) Nevertheless, Powell maintained Saddam Hussein aided and abetted al-Zarqawi and he offered a slide entitled, "Terrorist Poison and Explosives Factory, Khurmal" to illustrate the size of the facility. He also pointed out the deadly effects of poisons like ricin and how dangerous such a poison would be in the hands of suicidal terrorists. In retrospect, it is clear the Bush II administration exaggerated the ties between Saddam Hussein and al Qaeda terrorists to bolster its claim for regime change, but the training camp Powell described did, in fact, exist in northern Iraq and was the subject of a chapter in Zenko's book on discreet military operations (DMO's).

Zenko detailed how Ansar al-Islam ran a training camp near Khurmal, Iraq and how the U.S. government contemplated a brief military strike against it in the summer of 2002. According to Zenko, the U.S. military, including

General Richard Myers, chairman of the Joint Chiefs of Staff, believed a military strike against Khurmal was feasible, but the U.S. never took any action against the training camp until the Iraq war started in March 2003. Analyzing why the Bush II administration failed to strike against a known training camp in Iraq, Zenko examined several possible explanations and then concluded, “President Bush did not want to undertake any actions that could have derailed the option of regime change in Iraq” as the most plausible reason Khurmal was not attacked. (Zenko, 2010: 92) The failure to strike militarily at a known terrorist training camp in the summer of 2002 highlights the nature of the Bush II administration’s agenda at that time; administration officials were focused on promoting the neo-conservative goal of regime change in Iraq and were wary of becoming side-tracked. This focus on promoting regime change paid off in the sense that the U.S. eventually invaded Iraq in the spring of 2003.

The Bush II administration’s efforts to portray the security dilemma in the Middle East as centred on the regime of Saddam Hussein and not amenable to the strategies of containment or deterrence in 2002 and early 2003 had an effect on the American public. On the eve of the invasion of Iraq, more Americans supported the case for going to war against Iraq, presumably as a result of the January State of the Union address and Powell’s presentation at the UN. Invading Iraq was viewed as the next step, or the “central front” in the war on terror. In addition, a majority of Americans believed, erroneously, that Iraq was involved in the 9/11 attacks and Iraqi citizens had been on the planes in the 9/11 hijackings. Yet a majority of Americans wanted the UN to authorize the use of force against Iraq and

sizable protests against an invasion took place in major cities across the U.S. prior to the war. There were also large anti-war protests across the world, including massive rallies in Rome and London, prior to the invasion. In the end, dissent to the neo-conservative agenda for regime change in Iraq did not stop the war, which began with the bombing of Baghdad on March 19, 2003.

"Shock and Awe" Campaign

The Iraq war, also called Operation Iraqi Freedom, began with a conventional use of military force, utilizing American, British, Polish, and Australia military forces. The campaign was termed one of "shock and awe" as the coalition forces were applying massive amounts of force to the Iraqi forces to induce surrender. Saddam Hussein's conventional military was quickly defeated and Baghdad was occupied on April 9, 2003. At first, it appeared the neo-conservatives claim that defeating the Iraqi regime would be quick and easy was correct. President Bush appeared on the *USS Abraham Lincoln* on May 1, 2003 and famously declared that combat operations in Iraq ended under a banner proclaiming "mission accomplished." The Bush II administration later had to explain away the theatrical presentation of mission accomplished when the Iraq war turned into an insurgency with mounting American and coalition casualties. The failure to adequately plan for post-war Iraq and anticipate the sectarian divisions that fomented violence have been extensively documented elsewhere. (Ricks, 2006, Chandrasekaran, 2006)

This research examined the war in Iraq as ostensibly part of the Bush II administration's campaign against international terrorism because invading Iraq was always cited by administration officials as part of its "war on terror." However, none of the people interviewed as part of the research considered the use of force in the Iraq war as a *counterterrorism operation*. In fact, very few scholars analyze the Iraq war as a counterterrorism operation, partially because the purported ties between Saddam Hussein and members of al Qaeda were illusory, but this fact does not prevent some former Bush II officials from characterizing the war as the central front on the war on terror. The analysis in this section assumed, for the sake of argument, that the Bush II officials were correct in their characterization of the Iraq war as part of the U.S. effort to eradicate international terrorism.

II. Discreet Military Operations

The last sections of the chapter scrutinize the Bush II administration's smaller scale uses of force such as the use of predator and reaper drones in Afghanistan, Pakistan, Yemen, and other countries. First, the use of drones and how the Bush II administration altered the circumstances regarding their utilization will be examined because drones emerged as a weapon of choice in the war on terror. Then other types of discreet military operations like the use of Navy Seals or Special Operations Forces on the ground in Pakistan and Syria will be explored. The use of drones is potentially more significant in the long term in that their utilization is less costly than a full-scale invasion (like Iraq in 2003) or an operation with ground troops where U.S. casualties may be high. Thus, there are indications they may become a preferred

method of American policy makers. In fact, the Obama administration apparently favours the flexibility offered by drones and has increased their use in its counterterrorist operations.

Drones are remotely piloted, unmanned small aerial vehicles (also called UVA's) which are armed with missiles to find and kill Taliban and Al Qaeda militants in difficult or remote regions. During the Clinton administration, a small number of drones were used for *intelligence and surveillance* in areas where the CIA had few human sources on the ground. Although the Clinton administration experimented with putting bombs on drones and, according to some accounts, blew up a mock bin Laden house in the Nevada desert, it did not use armed drones. (Coll, 2004) After 9/11, the Bush II administration began arming them (usually with Hellfire missiles) and escalated their use as the invasion in Afghanistan proceeded without the capture of either Osama bin Laden or Mullah Omar. (O'Connell, 2010, and Gellman, 2002)

Drones, a type of discreet military operation, are often seen by executive branch policy makers as a less risky alternative than an operation involving ground forces that could result in military casualties. Discreet Military Operations or DMO's are defined as "a single or serial physical use of kinetic military force to achieve a defined military and political goal by inflicting casualties or causing destruction, without seeking to conquer an opposing army or to capture or control territory." (Zenko, 2010: 2) The primary political uses of force in DMO's may be categorized as compellence (a subset of coercive diplomacy); deterrence (trying to persuade a state to refrain from

taking a certain action); and punishment (inflicting physical destruction of a target through the direct and kinetic application of force). (Zenko, 2010: 18-21) During the Bush II administration, there were more than 30 DMO's, most of them drone strikes; the exact number is difficult to discern as the U.S. government does not officially acknowledge drone strikes.

The creation of an all-volunteer professional military in the U.S. in response to the Vietnam War resulted in large disparities between civilian policy makers and senior military officials as far as attitudes towards the use of force are concerned. In a study of DMO's from 1991 to 2009, Zenko discovered that "US civilian decision-makers are more willing both to rely on military force to achieve their foreign policy goals and to place constraints on the manner in which force is used than are their military counterparts." (Zenko, 2010: 25) In fact, the bifurcation between the military and civilian officials is so great that two distinct schools are discernable; the s*urgical strike school,* composed of mostly senior civilian officials who believe limited force has low domestic political costs if it fails and limited force can achieve limited political objectives. The other school consisting of senior military officials in the *functional force school,* echoes the Powell Doctrine in advocating that if force is to be used, it should be overwhelming and only used as a last resort in the bargaining process. Members of the functional force school are more likely to view limited force as rarely as precise and low cost as policy makers intend. (Zenko, 2010: 24) When combined with the phenomenon known as "military metaphysics" (the tendency to see international problems as military problems and to discount the likelihood of finding a solution except through military means, discussed in the section on the military), the result is a

preference for using force even in circumstances where the efficacy of force is unproven. As illustrated below, the use of drones to eradicate the leadership of al Qaeda and the Taliban often resulted in high civilian casualties with uncertain political results.

Building on the Clinton administration's drone program, the Bush II administration began arming drones and then dramatically increased their use. There are two drone programs: one run by the regular U.S military in war zones such as Afghanistan and Iraq; the other program is operated by the CIA. (Bergen Interview, Phythian, 2011) The latter program is more controversial for several reasons including its potential to operate anywhere in the world due to the Bush II administration's logic that the entire world constituted a battlefield in the WOT and the lack of transparency at the CIA. The first armed drone, a predator, was used in combat in Afghanistan in October 2001 by the military. Subsequently, in November 2001, the Department of Defense reported that a drone strike killed al Qaeda's military commander, Mohammed Atef outside the Afghan city of Jalalabad. (O'Connell, 2010: 3)

The CIA's drone program remains highly classified so the following information relies in part on a drones database maintained by Peter Bergen and Katherine Tiedemann at the New America Foundation; their information is culled from news reports from the BBC, Reuters, Agence France-Presse, *Wall Street Journal*, *New York Times*, and other sources with reporters in South Asia. According to this database, the civilian fatality rate as a result of drones was 28% in the years 2004 to 2009, although this number is disputed. The

exact number of civilians killed as a result of drone strikes is exceedingly difficult to pinpoint as the dead are immediately buried, the locations of strikes tend to be remote regions, and militants frequently isolate the area around a drone strike so that villagers and the media are unable to see it. Bergen and Tiedemann estimated that the civilian death rate after 2010 is "more likely 8%" due to increased accuracy and intelligence. The following tables illustrate the number of deaths:

Estimated Total Deaths from U.S. Drone Strikes in Pakistan, 2004 - 2010

	Deaths (low)	Deaths (high)
2010*	521	857
2009	413	709
2008	263	296
2004-2007	86	109
Total	1,283	1,971

**Through November 28, 2010*

Estimated Militant Deaths from U.S. Drone Strikes in Pakistan 2004 - 2010

	Deaths (low)	Deaths (high)
2010*	495	797
2009	293	405
2008	106	134
2004-2007	78	100
Total	972	1,436

**Through November 28, 2010*

Estimated Militant Leader Deaths from US Drone Strikes in Pakistan, 2004-2010

2010*	10
2009	10
2008	11
2004-2007	3
Total	32

**Through November 28, 2010. Included in estimated militants and estimated totals, above.*

In an interview with Bergen, he reiterated his position that drone attacks were the "least bad option" the U.S. government has for reducing the threat

from Pakistan's militants, both pro-Taliban and al Qaeda forces. He added, "There are caveats, however. The use of drones is a technical solution to the problem (which calls for a political solution ultimately). It is impossible to simply go into the tribal areas of Pakistan (the FATA, or Federally Administered Tribal Areas) and arrest people." (Bergen Interview) The lack of public discussion or debate and the failure of congress to investigate the drone attacks' legality or efficacy are striking given the history of *targeted* killings.

A brief overview of the history of targeted killings in the U.S. reveals that in 1976 President Gerald Ford signed an executive order banning political assassinations as a reaction to criticisms of covert CIA assassination programs in the Cold War. This became Executive Order 12333 in 1981, signed by President Reagan. Although Reagan's Executive Order remains in effect today, the context in which it operates has radically changed. After the 1998 embassy bombings in Africa, President Clinton issued a presidential finding (similar to an executive order) "authorizing the use of lethal force in self-defense against Al Qaeda in Afghanistan." (Blum and Heymann, 2010: 150) In effect, the CIA was authorized to kill Bin Laden and several of his top deputies only if deadly force became necessary during an attempt to capture them. Official U.S. policy remained opposed to targeted killings; in July 2001, after Israel used targeted killings against Palestinian terrorists, Martin Indyk, the U.S. Ambassador to Israel, said, "The United States government is very clearly on record as against targeted assassinations." (Mayer, 2009a)

However, after 9/11, the Bush II administration embraced a war paradigm for its use of force and made a crucial distinction between *assassinations* that are still not permitted and *lethal attacks on terrorists* that are "lawful battlefield operations against enemy combatants." (Blum and Heymann, 2010: 150) Also, "specific individuals who pose a direct threat to U.S. citizens or national security in peacetime" may be subject to targeted killing. (Blum and Heymann, 2010: 155) President Bush signed a Memorandum of Notification in September 2001 authorizing the CIA to kill al Qaeda terrorists on an undisclosed "high-value target list." This was an executive branch initiative taken without congressional input or oversight or public debate, based on an expansive reading of article 51 of the UN Charter, which allows countries to exercise the inherent right of self-defence. By categorizing its counterterrorism operations as a "war," the Bush II administration avoided the requirements of due process that would normally be accorded to suspects in a criminal procedure.

The first overt use of drones for a targeted killing outside the Afghan battlefield occurred on November 3, 2002 in Yemen when a predator drone bombed the vehicle carrying Abu Ali al-Harithi, suspected of planning the 2000 bombing of the *USS Cole*, and five others, including a naturalized U.S. citizen, Ahmed Hijazi. Yemen's president, Ali Abdullah Saleh, consented to the American operation because the Yemeni security forces were unable to capture al-Harithi and it was seen as a way of demonstrating to the Bush II administration that Yemen was "with" the U.S. in its WOT. However, this was a covert operation and the Yemeni government wanted its cooperation with the Bush II administration kept secret. Some one leaked the details and Paul

Wolfowitz soon appeared on CNN and confirmed in an interview that the U.S. was responsible for getting "rid of somebody dangerous." (Zenko, 2010: 87) Subsequent drone operations by the CIA have not been confirmed by the U.S. government, to avoid embarrassing any foreign government that may have consented to such an operation and to maintain secrecy.

The political objectives for the drone attack on al-Harithi were two-fold; first, "to deter Al Qaeda members from committing future terrorist attacks against the U.S. and its allies." (Zenko, 2010: 88) The second objective was to "compel more **consistent** counterterrorism cooperation from Yemen" but neither objective was achieved despite that fact that the military objective of killing al-Harithi was accomplished. (Ibid) Al Qaeda members continue to plan terrorist attacks against the U.S. and its allies while the questions of whether a non-state terrorist network can successfully be deterred and how best to compel other countries to cooperate in counterterrorism are continuing challenges for the U.S. How to effectively deal with al Qaeda terrorists operating out of Yemen also remains an issue for the Obama administration. In brief, the November 2002 Yemeni drone attack revealed that a DMO may have complete success in its military objective but fail to accomplish its political goals.

As noted above, subsequent drone attacks have not been officially confirmed by the U.S. government, so the numbers cited regarding drone attacks are culled from various unofficial sources including the New America database. The next drone attack after the one in Yemen in 2002 occurred in South Waziristan, Pakistan in June 2004 when four Taliban were killed,

including Nek Muhammad. In 2005, there were three drone strikes, all in Pakistan targeting Al Qaeda and Taliban leaders; the first, on May 8, had the military objective of killing Haitaham al-Yemein who was killed. The second attack on November 5 did not succeed in its military objective of killing Abu Hamza Rabia, a senior Al Qaeda leader, but his wife, daughter, and six others were killed. (Zenko, 2010: 143) The last known drone strike of 2005 occurred on December 1 and this time the military objective of killing Rabia was achieved. The political goals of all three 2005 strikes in Pakistan were similar, i.e. "to punish and to deter Al Qaeda from using Pakistan to plan and stage operations." (Zenko, 2010: 145) Although some Al Qaeda leaders were killed by drones, the political goals of the drone strikes were not entirely successful as Al Qaeda continues to use parts of Pakistan, particularly the FATA, as a planning area.

The two drone strikes of 2006 happened in January and the military objectives of both were to kill Al Qaeda and Taliban, including Ayman Al-Zawahiri, who was at that time, al Qaeda's second in command, after Bin Laden. During the second drone strike, in mid-January, as many as eighteen civilians were killed and these casualties led to mass protests in Pakistan. Pervez Musharraf, the military ruler of Pakistan, then condemned the attack and told the U.S. government that it "must not be repeated." (Witte and Khan, 2006: 1) However, one year later, in January 2007, another drone strike in Pakistan was launched to kill al Qaeda and Taliban militants and prevent other militants from using the territory as a planning area for future terrorism. This attack was followed by two or three more drone attacks in April, June, and presumably, November of 2007 with the intention of killing al Qaeda and

Taliban militants. Approximately 70 people were killed but no known militants were killed during these drone strikes. Pakistan experienced a great deal of turmoil in 2007 as Musharraf began losing his hold on political power and eventually gave up his military rank in November of 2007, while former prime minister Benazir Bhutto returned to Pakistan in October to campaign but was assassinated on December 27, 2007.

From the start of the WOT, President Bush relied on Musharraf as a partner in U.S. counterterrorism and the Bush II administration ramped up aid to Pakistan in return for cooperation in finding and capturing Afghan Taliban and al Qaeda. However, Pakistan's cooperation was always problematic in that the Pakistan security forces or ISI facilitated the rise of the Taliban in Afghanistan in the 1990's as a wedge against Pakistan's prime enemy, India, and questions about the ISI's loyalties to American security interests are plentiful. (Coll, 2004) Moreover, some Americans theorized that members of the Pakistani military or ISI gave advance warnings to Taliban and Al Qaeda agents in the FATA before the U.S. launched drone strikes, suspicions that are impossible to confirm. Until the beginning of 2008, the U.S. operated drones in the remote regions along the Pakistan-Afghanistan border "only under the most restrictive conditions." (Sanger, 2009: 236)

However, that arrangement began to change. On January 9, 2008, the Director of the CIA, General Michael Hayden, and the Director of National Intelligence, Mike McConnell, met with Musharraf to obtain "greater latitude in conducting U.S. combat operations against al Qaeda and the Taliban." (Zenko, 2010: 148) Musharraf agreed to enhanced sharing of intelligence and

more drone strikes but did not allow U.S. ground troops in Pakistan. A few weeks later, on January 29, 2008, a drone attack killed Abu Laith al-Libi, a senior al Qaeda leader from Libya who planned the suicide attack at Bagram during Cheney's visit in 2007, along with 12 or 13 other people, presumed militants. This drone strike occurred without advance permission from Musharraf. (Wright and Warrick, 2008: 1) In fact, later in 2008, the Bush II administration began using what Sanger claimed was called the "reasonable man standard" for drone strikes, i.e. "if it seemed reasonable, you could hit it" and "all notions of advance consultations with Pakistani authorities were scrapped." (Sanger, 2009: 250) The number of drone strikes increased dramatically in 2008; by the year's end, there had been roughly 34 drone strikes, most of them in South and North Waziristan, with approximately 11 militants killed. George W. Bush turned the presidency over to Barack Obama on January 20, 2009, but before he left the White House, there were two more drone strikes in South Waziristan in early January, bringing the total number of drone strikes during his eight years in office to about 45. The majority of the drone strikes occurred in Pakistan, ironically labelled a U.S. *ally* in the WOT by the Bush II administration.

Questions Surrounding Continued Drone Use

Even if some Taliban or al Qaeda militants (including senior leaders such as al-Libi) were killed in these drone strikes, the question remains whether broader American foreign policy goals are advanced by using discreet military operations like drones in the territory of an ally such as Pakistan. As noted by Zenko, even when the **military** objective of killing a

certain Taliban or al Qaeda operative was achieved, the **political** goal of deterring al Qaeda and Taliban from using the border region between Afghanistan and Pakistan as a base for planning operations usually met, at best, with "mixed success" as these militants continue their operations in this area today. In addition, the rise in the number of drone strikes in 2008 was accompanied by an increase in the number of civilian deaths, which acerbated Pakistani mistrust of the U.S. and facilitated al Qaeda's recruitment of foot soldiers. One paradox of the U.S.-Pakistan relationship was confirmed by the disclosure of State Department documents by WikiLeaks; the cables confirm that Pakistani officials condone the drone "attacks in private while opposing them in public."

Criticism of the drone strikes in the U.S. has been restricted to scholars, human rights groups, and a few political observers; notably, the first congressional hearing on the topic of drones occurred in the House of Representatives in 2010, after George W. Bush left office. The Senate has not held any hearings on this, despite its duty to oversee the CIA. This conforms to Koh's pattern of executive initiatives (the second Bush administration's policy of using armed drones) followed, predictably, by congressional acquiescence. Moreover, criticism of the drones falls into several categories including political, moral, and legal; the legal complications of the drone strikes will be examined first. The Bush II administration carefully built its legal justifications for the use of drones on the concept of anticipatory self-defence and relied on analysis from Abraham Sofaer, State Department Legal Advisor in the Reagan administration. The drone strikes are lawful, according to Sofaer's analysis that states have the right "to strike terrorists

within the territory of another State where terrorists are using that territory as a location from which to launch terrorist attacks and where the State involved has failed to respond effectively to a demand that the attacks be stopped."

Kenneth Anderson, echoing Sofaer, has written several articles expounding his view that drones are legal under both international law and domestic U.S. law. According to Anderson:

- "Targeted killings of terrorists, including by Predators and even when the targets are American citizens, are a lawful practice;
- Use of force is justified against terrorists anywhere they set up safe havens, including in states that cannot or will not prevent them;
- These operations may be covert—and they are as justifiable when the CIA is tasked to carry them out secretly as when the military does so in open armed conflict.
- All of the above fall within the American legal view of 'self-defense' in international law, and 'vital national security interests' in U.S. domestic law." (Anderson, 2010: 27)

Not all legal experts agree with Sofaer and Anderson. For example, Professor O'Connell discussed the requirements for lawful self-defence under international law and cited the ICJ verdict from the *Nicaragua* case in 1986. In that case, the court held, "acts triggering the right to use armed force in self-defense must themselves amount to armed attacks." (O'Connell, 2010: 13) In addition, terrorist acts are usually sporadic events and generally treated as

criminal acts because "they have all the hallmarks of crimes, not armed attacks that can give rise to the right of self-defense." (O'Connell, 2010: 14) While the legal debate continues, so do the drone strikes.

Philip Alston, formerly the UN's Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, repeatedly asked the Bush II administration for the CIA's legal justifications for targeted killings but received no response. In May 2010, the UN released a report on targeted killings, written by Alston in which he wrote that the CIA would not disclose its legal basis for targeted killings. (Alston, 2010: 22) In addition, Alston noted, "*Outside of armed conflict*, killings by the CIA would constitute extrajudicial executions assuming that they do not comply with human rights law." (Ibid) Alston then discussed CIA killings, assuming "without accepting" that they are conducted "in the context of armed conflict," the position of the Bush II administration's New Paradigm. Alston also concluded that states should identify the legal framework they use to justify targeted killings, and other states (such as Pakistan) should publicly indicate whether they consented to the targeted killings. He recommended that all states "make public the number of civilians collaterally killed." (Alston, 2010: 27)

The current UN Special Rapporteur, Christof Heyns, reiterated Alston's concerns and questioned the American government's use of drones regarding ongoing issues of accountability and transparency in 2012. He wrote that the U.S. has not clarified the rules that it considers to cover targeted killings, even under the Obama administration. (Heyns, 2012: 22) Moreover, Heyns wrote, "the practice of targeted killing could set a dangerous precedent, in that any

Government could, under the cover of counterterrorism imperatives, decide to target and kill an individual on the territory of any State if it considers that said individual constitutes a threat." (Heyns, 2012: 23)

Gary Solis, an American military law expert, along with other legal scholars, noted that the **military** operates drones under a legal code that specifies judicial mechanisms for mistakes, but the code the CIA operates under is unknown. Solis argued that the CIA operators of drones are "unlawful combatants" because they are "fighters without uniforms or insignia, directly participating in hostilities, employing armed force contrary to the laws and customs of war" as the CIA pilots are "civilians violating the requirement of distinction." (Solis, 2010) Others question the use of military contractors to arm the drones with bombs. The International Committee of the Red Cross (ICRC) published a guidance on direct participation in hostilities in 2009 and according to this, "CIA personnel and their civilian contractors in the armed drone program may be targeted" whether they are in Virginia (at CIA headquarters) or on an air force base in the U.S. or Pakistan. (Horton, 2010) One of the most inexplicable aspects of the limited legal debate on drones is the absence of congressional oversight and guidance.

The Obama administration, pushed to explain its expanded use of drones in 2009, finally had its State Department Legal Advisor, Harold Koh, discuss the legal framework in a speech in 2010. Koh argued that the drone program was lawful due to the principle of self-defence in article 51 of the UN Charter and repeated the Bush II administration's analysis that the U.S. was in an "armed conflict" with al Qaeda. (Koh, 2010) In addition, the U.S. was

careful to follow the principle of *distinction* (which requires attacks to be limited to military objectives, not civilians), and the principle of *proportionality* (which prohibits attacks that are excessive in relation to concrete and direct military objectives). (Koh, 2010) Finally, Koh denied that the U.S. engaged in extrajudicial killings, reasoning that the U.S. is not required to provide targets with any legal process before using lethal force because the U.S. remains engaged in an "armed conflict" and is exercising legitimate self-defence. (Koh, 2010) The next chapter on the legacy of the Bush II administration returns to the implications involved in drone use, and the similarity between the legal reasoning of both the Bush II and the Obama administrations regarding their drone programs.

Other critics of the drone program analyze it more on political and ethical grounds, asking, for example, if the number of civilians killed accidentally by the drones makes the costs outweigh the benefits of the programs. In an op-ed from May 2009, David Kilcullen and Andrew Exum argued that the costs of drone strikes outweighed the benefits for three reasons: the strikes caused a "siege mentality among Pakistani civilians," in addition to the "public outrage" while the use of drones is "a piece of technology substituting for a strategy." (Kilcullen and Exum, 2009) Others questioned whether the U.S. is setting a dangerous precedent for other nations to follow, given the likelihood that drone technology will eventually fall into the hands of those opposed to U.S. foreign policy. The disclosure of documents by WikiLeaks revealed that many countries are requesting drones from the U.S., including Turkey and the United Arab Emirates. As Peter Bergen stated during the interview, "Drone technology is not that complicated

so other countries are getting it and it's always possible that others will use it, too, like the Russians in Chechnya." (Bergen Interview)

In a chapter exploring the tension between ethics and intelligence, Phythian explored the time frame in which decisions on collection, targeting, and response are made regarding the drone programs. (Phythian, 2011) He noted that traditionally there was a bifurcation of sorts between decisions on the collection and analysis of intelligence, on one hand, and decisions regarding what actions to take in response to the intelligence. However, CIA intelligence officers remotely piloting drones are working in a compressed time frame in which "*analysis* is undertaken immediately by the same people involved in collection, and the *response* follows immediately from the analysis (i.e. to launch a Hellfire missile with the intention to kill/not to launch a missile)." (Phythian, 2011: 130) In the absence of congressional guidance, the ethical choices and dilemmas underlying drone use are likely to remain in academic circles.

Finally, there is a broader point about targeted killings in general. Do they actually reduce terrorism? An analysis by the Brookings Institute in 2009 noted that targeted killings are "a poor second to arrests" because dead men cannot be interrogated; it called the killings "a flawed short-term expedient." (Byman, 2009: 2) Paul Pillar, former CIA counterterrorism expert, cautioned that the benefits of targeted killings may not outweigh the costs. Writing in 2001 before the 9/11 attacks, he noted examples where assassinations resulted in the death of the wrong person because accurate intelligence is difficult. He then listed the costs of targeted killings as weakening an

international norm against assassinations of foreign leaders (one norm that is in the interest of the U.S. to keep); "stooping" to a tactic used by the terrorists themselves; and "resurrecting old suspicions about what the CIA and other U.S. intelligence and security services were doing." (Pillar, 2001: 122) In an interview in 2010, Pillar asserted that his analysis in his book *Terrorism and U.S. Foreign Policy* remained valid in the post-9/11 world. (Pillar Interview)

Pillar maintained in the interview that drones needed to be "kept in the toolkit. We have been using them since Clinton; the pace of their use was cranked up under Obama. There is a cost/benefit analysis and we need to be mindful of the downsides to using drones, namely civilian casualties and the resentment this causes. The use of drones may be feeding resentment among the civilian population in which case, more potential terrorists are recruited after their use." (Pillar Interview) When asked about who should be making the decisions on drone use, Pillar replied, "That is a good question. Congress cannot make the individual decisions but it should do more oversight. Congress needs to be involved by setting forth the standards and rules on when to use a drone against a target." (Pillar Interview) Finally, Pillar was circumspect in commenting on the Obama administration's announcement that Anwar al-Aulaqi, an American in Yemen allegedly helping Al Qaeda, could be killed by a drone; note that Pillar was interviewed prior to al-Aulaqi's death. According to Pillar, "I am not sure he should be a target for drones; his U.S. citizenship is an issue. It is problematic. I think the first choice is capture or rendition." (Pillar Interview)

On December 7, 2010, a federal court hearing a case brought by al-Aulaqi's father decided that it could not decide the issue of whether the U.S. government could target him for death overseas because he was not in court. Al-Aulaqi remained a target for U.S. drones and was killed on September 30, 2011, by a drone in northern Yemen, along with another American citizen, Samir Khan, who was the co-editor of an al Qaeda magazine. According to press reports, the killings were justified by the Obama administration under a secret Department of Justice memo that characterized al-Aulaqi as an operational figure within al Qaeda who posed an "imminent threat" to the U.S. In June 2012, the memo remains classified.

Despite the controversies involved in the deployment of drones, their use accelerated in the Obama administration. According to a recent *New York Times* article, the Obama administration "solved" the problem of civilian casualties from drone strikes by counting all military-age males in a strike zone as combatants "unless there is explicit intelligence posthumously proving them innocent." (Becker and Shane, 2012: 6) If this is accurate, it points to the lack of transparency and oversight that has characterized the drone program since the start of the war on terror.

Other Discreet Military Operations in the Bush II Administration

Although drones became a frequent type of DMO during the last part of the Bush II administration, there were other uses of military force as part of the WOT. The two discussed below merit further examination because they were single uses of force, unlike the wars in Afghanistan and Iraq, and they

illustrate the dilemma of achieving mixed or partial military success without achieving corresponding political success. The first DMO involved Navy Seals conducting a ground raid into South Waziristan without the approval of the Pakistan government on September 3, 2008. President Bush authorized the raid in an effort to deter Al Qaeda from using Pakistan as a base for operations; no high value targets were captured or killed, but some militants were killed. (Zenko, 2010: 152) After a shoot out, the Seals were evacuated by U.S. helicopters dispatched from near-by Afghanistan and "suddenly the Pakistani newspapers were filled with tales of the raid, with disputes about how many people were killed." (Sanger, 2009: 256) Reflecting on the raid, one Bush official asked, "Is it worth it, if you Talibanize 166 million people, and you don't come up with one dead Al Qaeda guy you can name?" (Sanger, 2009: 257)

The next month, shortly before the 2008 elections on October 27, US Special Forces troops landed in the village of Sukkariyah, Syria, near the Syria-Iraq border. The military objective of killing an Al Qaeda in Iraq (AQI) operative named Abu Ghadiyah was achieved according to reports, but several civilians were killed, too. (Schmitt and Shanker, 2008: 1) The political goal of deterring Syria from permitting its territory to be used to assist insurgents in Iraq was not completely successful as reports in 2009 indicate that Syria was not stopping the flow of fighters and arms migrating to Iraq. The efficacy of using force in this situation remains unclear but it is certain that at times political leaders want to be seen to be "doing something" in response to a foreign policy problem, and they will expect senior military officials to be able to develop military options. In both of these DMO's, congress was not

involved, nor told of the plans until the operations began. This lack of congressional involvement prevented meaningful oversight and reduced the likelihood of objective assessment of DMO's effectiveness.

Conclusion

A central question of the research is whether the Bush II administration's use of force to combat international terrorism was different from the previous three administrations. George W. Bush was not the first American president to use military force after a terrorist attack; Ronald Reagan and Bill Clinton both did. However, their uses of force were more like discreet military operations, short, targeted strikes that did not involve ground troops or occupying territory. Their goals for the uses of force were more modest, i.e. punishing terrorists or the states that supported them and deterring future acts of terrorism. The Bush II administration, on the other hand, established the goal of eradicating terrorism in its war on terror.

Moreover, only the administration of George W. Bush fused the use of force against terrorism to the neo-conservative agenda to remake the Middle East by spreading American values and deposing anti-American regimes like Saddam Hussein's. By combining the administration's counterterrorism program with the perceived needs of the security paradigm in the Middle East, President Bush and his advisors had a grand vision for American foreign policy. Their ability to articulate this vision and make it palatable to a majority of the American public is probably due in large part to the shock of the 9/11 attacks and the careful cultivation of the politics of fear. Despite their success

in articulating the agenda and carrying it out in Iraq, the remainder of the neo-conservative program to remake the Middle East was stymied due to the insurgency and costs of the Iraq war. George W. Bush's conservative domestic agenda also suffered as a result of the costs of the Iraq war and the subsequent loss of public support. In contrast, neither Reagan nor Clinton experienced a drop in support for their domestic agendas due to their discreet military operations against international terrorists.

The links between the Reagan presidency and second Bush administration cannot be overstated as much of what occurred during the second Bush administration can be traced to roots in the Reagan years. For example, the section on the New Paradigm for the WOT noted the use of signing statements to bypass congressional intent. Although signing statements existed prior to the Reagan presidency, Reagan's Justice Department championed their use and foreshadowed their even more extensive use in the Bush II administration. President George W. Bush built on precedents from the Reagan years in other ways; by establishing a "war" on terror after 9/11, Bush was following in Reagan's footsteps. The dichotomy of terrorism as war versus crime with its policy implications is apparent in all four administrations, but it was during the Reagan years and the second Bush administration that officials embraced the war paradigm in more ways than the merely rhetorical.

The descent into tactics of questionable legality during the Bush II administration is partially due to the mentality of many officials who were told to "take the gloves off" and fight a "war" against terrorists. The focus of this

research has not been on analyzing these tactics and practices, although they form the background to the Bush II administration's war on terror and were therefore previously discussed when relevant. Abusive practices towards detainees may have hampered the search for members of al Qaeda, as allies of the U.S. were concerned about cooperating too much with the administration, fearing being implicated in illegal or prohibited practices. In addition, the abuses in detention centres from Iraq and Afghanistan and Guantanamo alienated Muslims worldwide at a time when winning the ideological campaign was important in suppressing terrorism. Finally, photos of detainee abuse and documented cases of prisoner mistreatment validated Osama bin Laden's narrative that the West was at war with Islam. The next chapter explores the legacy of the Bush II administration.

Chapter 8
The Legacy of the Bush II Administration

President George W. Bush left office on January 20, 2009, and a new President, Barack Obama, took the oath of office promising to bring "change" to the U.S. However, despite pledges to close GITMO and chart a new direction in the wars in Iraq and Afghanistan, the Obama administration is plagued by the long shadows cast by the previous administration's counterterrorism policies. This section will examine the legacy of the Bush II administration beginning with the implications of Osama bin Laden's death on May 2, 2011. Other aspects of the Bush II administration will be explored in the context of future implications, which include: the embrace of a war paradigm to fight a "war on terror," the impact on civil liberties, the expansion of executive power, and the modification of UN norms on the use of force.

The results presented here attempt to address the research questions outlined in the introductory chapter. Due to the legal and political emphasis in the questions, both international and domestic legal constraints on the use of force were examined. Indeed, the overriding focus of the inquiry has been the presence or absence of constraints on the President to use force against international terrorism. Broadly speaking, these constraints are divided into internal constraints and external constraints, which may affect the decision to use force as a counterterrorism tool. The main internal constraints may be categorized as domestic legal norms and political institutions within the U.S. such as congress and the judiciary; powerful political actors such as the Secretary of State and Defense; and the administration's theoretical construction of terrorism as either war or crime. The major external

constraints which may affect use of force decisions include international legal norms and the geopolitical circumstances and international environment prevailing at the time of the decision. The research and interviews attempt to interweave the two dynamics, internal and external, and to discern patterns among the four administrations in so far as they responded with force to international terrorism.

One advantage of using force to prevent or respond to terrorism in the manner advocated by the Bush II administration is that the muscular use of American military forces may serve as a deterrent to other terrorist attacks. In theory, this might explain why there have been no major attacks on U.S. soil since the 9/11 tragedy. However, there may be other reasons for the absence of a large-scale attack on the territory of the U.S. For example, better intelligence and coordination among law enforcement agencies in the U.S. and abroad may explain it. Deterring terrorists is a difficult concept to empirically verify with many analysts distinguishing between state-sponsored terrorism and terrorism by non-state actors. State-sponsored terrorism is believed to be more deterrable because the state supporting the terrorists knows that if the attack is traced back to its territory, the U.S. will retaliate with massive force, while non-state actors are less likely to have an address and more willing to use extreme types of terrorism such as sarin gas (The Tokyo subway attack by Aum Shinrikyo in 1995, for example). Furthermore, as Pillar and Preble note, "the biggest advantage of the military instrument over other counterterrorist tools is that the potential effect on terrorist capabilities is immediate and unqualified." (Pillar and Preble, 2010: 69) By using force to combat international terrorism, the U.S. military has detained thousands of

suspected terrorists in Afghanistan, Iraq, and other places, thereby disrupting planning for operations against the U.S. and its allies. Another related advantage to using force is many suspected terrorists have been killed, including the inspiration and leader of al Qaeda, Osama bin Laden.

Death of Osama bin Laden

Most Americans expected that Osama bin Laden would be captured or killed when the U.S. invaded Afghanistan and evicted the Taliban leadership in Kabul late in 2001. When bin Laden escaped at the battle of Tora Bora, President Bush declared he was wanted “dead or alive” and with the full weight of the U.S. intelligence services searching for al Qaeda, it was assumed that bin Laden would be cornered quickly. The evidence indicates that the Bush II administration reassigned resources devoted to tracking bin Laden and al Qaeda to the Iraq theatre once the invasion of Iraq began in March 2003. The trail of bin Laden and the top al Qaeda leadership went cold for years and Bush then began to downplay the importance of capturing him, particularly as the 2004 election campaigns neared. Bergen noted that bin Laden’s ability to evade capture increased his status as a “folk hero” or spiritual guide for al Qaeda followers. (Bergen Interview)

More than two years after Bush left the White House, President Obama made a dramatic late night announcement in May 2011 that Navy SEALS under the command of the Joint Special Operations Command had killed bin Laden in Abbottabad, Pakistan. During the raid, three other men and one woman were killed, and one woman was injured; the children living in the

compound were not physically injured. The SEAL team took bin Laden's body and buried him in the Arabian Sea within 24 hours of his death according to Islamic precepts after the U.S. made a positive DNA match. President Obama stated that the reasons for his burial at sea were the difficulty of finding a country to accept his body and to avoid establishing a grave that could become a shrine. In addition, the Obama administration declined to release photos taken of bin Laden's dead body to avoid inflaming Muslims worldwide. The Pakistani government protested the incursion by the U.S. military as a violation of their sovereignty, but there was also an undercurrent of embarrassment that Osama bin Laden had been living in Pakistan for years.

In the U.S., the response to the raid was jubilation that bin Laden was finally dead, followed by an increase in the war of words over the Bush II administration's "enhanced interrogation" methods, which will be discussed below in the section on civil liberties. Details about the raid were closely guarded by the Obama administration. In addition, the legality of killing bin Laden in this type of raid was largely assumed by the Americans; Attorney General Eric Holder told the Senate Judiciary Committee that the acts were "lawful, legitimate and appropriate in every way." Other legal analysts noted that the targeting and killing of an adversary in war was lawful. For instance, Kenneth Anderson, a fellow in national security and law at the conservative Hoover Institution stated, "the fact that the United States has announced it is in an armed conflict with al Qaeda makes the operation legal under international law. It's lawful for the United States to be going after bin Laden if for no other reason than he launched an attack against the U.S." The Obama

administration appeared to embrace the war paradigm to justify the legality of killing bin Laden, and avoided analysis of extrajudicial or targeted killings.

Other legal commentators were not as certain about the legality and cautioned that all the facts needed to be evaluated. (Bowcott, 2011) British legal expert Philippe Sands QC, author of *Lawless World* and *Torture Team,* noted that a definitive legal judgment was not possible until all the facts were known. Moreover, a prosecutor from the Nuremburg Trials, American lawyer Benjamin Ferencz, told the *Guardian UK* that it would have been better to capture bin Laden and put him on trial, as the allies tried Nazi officials after World War II. The exact circumstances of bin Laden's killing may never be fully revealed as the U.S. government clearly does not want a prolonged discussion of how the unarmed bin Laden resisted capture.

Tools for Combating Terrorism

Throughout this research, the various tools for combating terrorism were mentioned, although the research questions revolved around the use of force, thereby emphasizing this method. According to the *9/11 Commission Report*, long-term success in the struggle against al Qaeda and related groups "demands the use of all elements of national power: diplomacy, intelligence, covert action, law enforcement, economic policy, foreign aid, public diplomacy, and homeland defense." (National Commission, 2004: 363-364) The purpose of this research was to compare and contrast the four administrations' use of force and evaluate any apparent trends. One of the conclusions of the research is that the second Bush administration continued

many of the same counterterrorism policies of its predecessors, despite the administration's rhetoric that it was "going on the offense" and "launching a war on terror." It is appropriate in this context to briefly analyze the effectiveness of counterterrorism tools and indicate what might happen in future administration. This section begins with a summary of the interviewees' statements on the use of force for counterterrorism.

When discussing the use of force for counterterrorism during the interviews, all those questioned stated their belief that force would occasionally be necessary, particularly in light of contemporary terrorist trends, such as the willingness of some religiously inspired terrorists to commit suicide during large-scale attacks. The interviewees did emphasize that over-reliance on using force as a counterterrorist tool would be counterproductive and inimical to American national security. Peter Bergen, for example, noted that the effectiveness of force was "strongly dependent on the circumstances of its use" and went on to describe how Clinton's 1998 cruise missile strikes against bin Laden were not especially effective as they augmented bin Laden's status as a folk hero when he escaped. (Bergen Interview) Bergen addressed the option of doing nothing in response to an attack, citing George H.W. Bush's lack of response to the Lockerbie bombing in 1988 and argued that some response, including a use of force, would have been better than *no response*. (Ibid) Bergen distinguished the effectiveness of using force against a state sponsor of terrorism and against a transnational terror group by explaining that force is probably more effective against a state sponsor with a "return address." (Ibid)

In his interview, Lawrence Wilkerson, former chief of staff to Colin Powell, elaborated on how central decision making in the White House has been the norm since the passage of the National Security Act in 1947. (Wilkerson Interview) He drew attention to the fact that the U.S. military, rather than the State Department, is increasingly called upon to solve more international and security problems. According to Wilkerson, the President sees every international problem as a "nail and the military is the manner, so of course, he is going to use the tool he has on the nail." (Ibid) This observation from a Bush II administration official conforms to the theory articulated by scholar Andrew Bacevich who charted the rise of American militarism and "military metaphysics," the tendency to see international problems as *military* problems and to discount the likelihood of finding a solution except through military means. (Bacevich, 2005)

Paul Pillar, who spent 28 years in the U.S. intelligence community, serving during several administrations, expressed his view that there was a great deal of continuity among the four administrations on the basic tenets of counterterrorism. (Pillar Interview) Both he and Wilkerson, both former Bush II administration officials, stressed that the war in Iraq was "not about counterterrorism." (Pillar Interview and Wilkerson Interview) In fact, the lack of scholarly support for the proposition that the 2003 invasion of Iraq was motivated by counterterrorist operations and methods is striking. In Pillar's words, terrorism provided the "rhetorical drumbeat that tied 9/11 and Iraq together." (Pillar Interview) Both Wilkerson and Pillar explained that the invasion of Iraq in 2003 was part of a neoconservative agenda to remake the Middle East. For Pillar, the attacks of 9/11 persuaded people that the "old

bargain of the Middle East," i.e. cooperation with undemocratic regimes to sustain oil production in exchange for U.S. security guarantees, would not continue to work. (Pillar Interview)

Another interviewee who spent 21 years working at the CIA as an analyst stated that the "war on terror" was a poorly chosen phrase because it had the effect of inadvertently radicalizing Muslims by implying the U.S. was at war with Islam. (Interviewee A) The interviewee explained the "ziggurat of zealotry," a model designed by CIA analysts to gauge levels of radicalization; at the bottom of the pyramid are peaceful, pious Muslims while the top level includes only those individuals who plan on extending violence globally as adherents to the al Qaeda ideology. (Ibid) The invasion of Iraq in 2003 "pushed many Muslims into radicalism because they were alienated from what the U.S. was doing in Iraq." (Ibid) Whether or not the Iraq war was the "central front in the war on terror," as President George W. Bush claimed, it had the effect of bolstering al Qaeda's message that the West wanted to subjugate Muslims and control Islamic territories. It also aided the recruitment of jihadists, as al Qaeda and related groups used the gap between the professed ideals of the U.S. and its own practices towards detainees as a propaganda tool. Incidents where civilians were killed by American troops fed into bin Laden's narrative and increased recruitment, too. (Ibid)

Interviewee A, who worked at the CIA during both the Clinton and Bush II administrations, was asked whether there were substantial differences between these administrations. She stated, "There was a big distinction between the Clinton and Bush administrations. The Clinton administration,

from Tony Lake onwards, was professional about terrorism and convinced that transnational terrorist networks were a big problem for the U.S. On the other hand, Bush officials were not convinced that international terrorism was that sort of problem. Many of them were what we called 'Cold Warriors' from the Cold War. There was no real Arabist among the national security team at the Bush White House. There was no real non-Cold War expert. Dr. Rice, for example, focused on the strategic missile defense initiative before 9/11." (Interviewee A) She added, "There were lots of warnings before 9/11 but no real response to them." (Ibid) The implication that the second Bush administration was not sufficiently focused on international terrorism in the months preceding 9/11 has always been adamantly denied by top officials. (Bush, 2010; Cheney, 2011; Rice, 2011)

Fighting the war of ideas, although subordinate to the Bush II administration's goal of disrupting terrorist networks with the use of force, was part of the administration's stated aims in the WOT. According to Wilkinson, the British expert on terrorism, "democracies must also learn to defeat the terrorists' sustained propaganda war," suggesting that narratives and ideas matter in preventing terrorism and responding to terrorist cells. (Wilkinson, 1986: 300) The concept of public diplomacy, the government's process of communicating with foreign publics to enhance understanding of American institutions, culture, and law, was discussed extensively by Bush administration officials after 9/11. President Bush himself often indicated that the "war of ideas" was very important in curtailing terrorist activity. However, the director of the State Department Office of Public Diplomacy changed several times during the Bush years, resulting in leadership problems. More

relevant to this research is the problem of funding; compared to the vast amounts allocated to the military and using force in the WOT, public diplomacy received a pittance. In fiscal year 2008, for example, only $890,889 was allocated to the U.S. State Department for public diplomacy. (Nakamura and Weed, 2009) If funding accurately corresponds to administration priorities, then Bush II administration policy makers felt funding the use of force was many times more worthwhile than public diplomacy programs aimed at winning the war of ideas.

Writing after the invasion of Iraq, Burke advised that winning the battle against al Qaeda involved a battle for "hearts and minds." (Burke, 2004: 291) He observed, "Military power must be only one tool among many, and a tool that is only rarely, and reluctantly, used. Currently, military power is the default, the weapon of choice." (Ibid) By phrasing the campaign against al Qaeda as a full-fledged war, the Bush II administration clearly signalled its intent to use force and rely on the military as much as possible.

In addition, several scholars and policy analysts argued that the term "war" should be eliminated from the Bush administration's counterterrorism vocabulary as it indicated a battlefield solution to the problem and legitimized al Qaeda fighters as holy warriors instead of criminals. No one interviewed in the course of this research expressed any confidence in the term "war on terror" or advocated its sustained use. In fact, Paul Pillar discussed the counterproductive effects of using the term "war on terror" in detail. These include implying that the military is the main counterterrorist instrument and that the "war" will have a definitive end one day, like the world wars. (Pillar

Interview) In addition, using the phrase "war on terror" contributes to "conflating many different entities into a supposedly monolithic threat." (Ibid) In *Terrorizing Ourselves*, Pillar and Preble wrote, "We do not advance our broader objectives of diminishing [Osama bin Laden's and Ayman al Zawahri's] appeal to their target audience and otherwise rendering them to the margins of history---where they belong---by portraying them as being on par with" Stalin and Hitler, leaders of major nation-states with large conventional armies. (Pillar and Preble, 2010: 78) However, the Bush administration resisted such advice and continued using the war terminology until the end of its time in office, suggesting that part of the reason for continuing the terminology was political.

The Bush administration championed the use of force against terrorism, yet rarely explained why the use of force was the best possible tool for countering terrorism, beyond issuing platitudes about "taking the fight to the enemy" and remaining "on the offense" against terrorism. In reality, counterterrorism experts such as those at RAND, downplay how effective the use of force by the military can be in a counterterrorism program. For instance, in an extensive study published in 2008, two RAND analysts documented how terrorists groups end by analyzing 648 terrorist groups from 1968 to 2006. According to this study, 40% of the groups ended due to law enforcement methods, 43% ended with a transition to a nonviolent political process, and 10% ended with the groups' victory. Despite the Bush administration emphasis on the use of force, "The military is usually too blunt an instrument and most soldiers are not trained to understand, penetrate, and destroy terrorist organizations; thus, **7 percent of terrorist groups have**

ended as a result of military action." (Jones and Libicki, 2008: 126, emphasis added) The study also recommended that the notion of a war on terrorism should be ended and replaced with concepts such as *counterterrorism.* (Jones and Libicki, 2008: xvi)

Impact on Civil Liberties

A British terrorism expert, writing about liberal democracies and the threat posed by terrorism, noted, "Extralegal actions will only tend to undermine democratic legitimacy and destroy public confidence. Any breach of legality will be exploited by terrorist propagandists to show the hypocrisy of government and security forces' claims that they are acting in the name of the law. . ." (Wilkerson, 1986: 295-6) The evidence from the war on terror indicates that, despite promises to "respect American values," many times members of the Bush II administration engaged in extralegal actions in the pursuit of al Qaeda.

How President George W. Bush dealt with the tension between security and liberty is surely a large part of his administration's legacy. This research has primarily focused on the use of force and not on the domestic or international consequences of counterterrorism policies that curtail civil liberties. Despite this focus, no discussion of the Bush II administration is complete without mentioning the erosion of civil liberties that occurred, both in the U.S. and abroad. In particular, the use of techniques previously considered torture or inhumane and degrading treatment as part of the "war

on terror" marks a significant departure from the practices of the Reagan, Clinton, and first Bush administrations.

As the initial euphoria of killing the most wanted terrorist wore off, several former members of the Bush II administration appeared on various American media outlets to emphasize the utility of the "enhanced interrogation" methods that were used in 2003 and 2004. For example, both Dick Cheney and Donald Rumsfeld gave interviews on the death of bin Laden in which they definitively tied the use of harsh techniques to the intelligence that ultimately yielded the safe house in Abbottabad. Furthermore, in a *Wall Street Journal* opinion piece, John Yoo wrote that finding bin Laden "vindicates the Bush administration, whose intelligence architecture marked the path to bin Laden's door." (Yoo, 2011) The contention that the waterboarding of Khalid Sheik Mohammad (KSM) led to the eventual discovery of one of bin Laden's trusted couriers which, in turn, led to bin Laden, compelled Senator John McCain (R-AZ) to condemn the use of torture on the Senate floor. McCain, a victim of torture when he was captured by the North Vietnamese, strongly disputed the suggestion that bin Laden's discovery was made possible due to torture. Then, former Attorney General Michael Mukasey, appointed by Bush after Gonzales resigned, came forward to argue that his "sources" assured him KSM "broke like a dam under the pressure of harsh interrogation techniques that included waterboarding. He loosed a torrent of information---including eventually the nickname of a trusted courier of bin Laden." (Mukasey, 2011) Besides the impossibility of proving a link between waterboarding KSM and finding bin Laden's compound with the information currently available, the discourse on the usefulness of techniques

formerly considered torture in the U.S. point to a troubling legacy of the Bush II administration.

Human rights advocates argue that it is difficult to believe Americans who were once active in governing a liberal democracy are actually advocating the use of methods that were formerly condemned by previous U.S. governments and most other governments around the world. **Debating the usefulness of torture** would have been unthinkable prior to the Bush administration's "war on terror" and for many, this may be that war's most disturbing legacy. The Bush administration officials who continue to point out the effectiveness of their techniques avoid calling "enhanced interrogation" methods torture and this reticence has been taken up by the American press. According to a 2011 study from Harvard's Kennedy School of Government, American newspapers called waterboarding torture until 2004 when the news broke that the Bush II administration did it to at least three detainees. Since 2004, the American mainstream media has usually treated the issue of waterboarding as "disputed" or "controversial" and avoids labelling it as a form of torture.

Former Bush II administration officials also fail to address other aspects of the torture debate, in particular, the legal and moral questions involved in using torture to extract information from detainees. Leaving the morality of torture to ethicists, a brief examination of the legality of "enhanced interrogation" reveals that the most egregious of the methods, waterboarding, violates both international law (including the Convention against Torture) and U.S. federal law. Other methods such as sleep deprivation, hooding, stress

positions, being stripped naked and subjected to loud music and extreme temperatures may rise to the level of torture or inhumane treatment, particularly when used in combination with each other. The U.S. government frequently condemned these types of interrogation methods prior to the Bush II administration. In fact, in 1947, the U.S. prosecuted a Japanese officer, Yukio Asano, for war crimes for waterboarding an American during WWII. (Pincus, 2006) It is impossible to predict how long the stain of having used such methods will hang over the U.S., whether an American citizen will be subjected to this type of treatment in the future, and what the unintended consequences of torture are. What is known is that the current debate centres around whether the "enhanced interrogation" methods used on detainees worked, and not on their legality or morality. Thus, the Bush II administration succeeded in lowering the bar to the level of utility as far as torture is concerned.

In his book *Torture Team*, Sands explored whether the Bush II administration lawyers who wrote the legal memos which resulted in detainee abuses should be held accountable for their legal advice. He noted the analogy in the legal reasoning between lawyers tried at Nuremberg in the *Altstotter* case and lawyers writing the New Paradigm for the WOT: "domestic law and national security needs trump everything, international rules are obsolete, a new paradigm exists." (Sands, 2008: 187) In the book, Sands questioned Douglas Feith, the former undersecretary of Defense, about the culpability of lawyers working on the New Paradigm; Feith was understandably unhappy with any analogy with Nazi lawyers, pointing out that their crimes were part of a regime's attempt to exterminate an entire race of

people. At the conclusion of their discussion, Sands quoted Feith as saying the lawyers working for the Bush II administration "were all grappling with this extremely difficult problem of how do you defend the system against enemies of this kind, and some people came up with some ideas that were a little over-enthusiastic and some of these ideas have nothing to do with the war on terrorism, they have everything to do with these broader points about presidential power." (Sands, 2008: 190) In the end, many of the broader points about presidential power will remain unresolved and available as precedents for the next administration that feels it is faced with a novel enemy and huge security risks. In theory, it is still possible for some lawyers in the Bush II administration to face consequences for promulgating these memos, despite the fact that the Obama administration has taken no action to hold them accountable for their lawyering. In practice, it is very unlikely.

Other rights long considered intrinsic to a liberal democracy such as the right to a speedy trial in a civilian court, and the right to hear what one is accused of, were curtailed in the Bush administration's "war on terror" and the ramifications are still being felt. Article I, section 9 of the U.S. Constitution permits Congress to suspend the writ of habeas corpus, long considered central to the maintenance of liberty, only in "cases of rebellion or invasion." On November 13, 2001 President Bush issued a military order stating that non-citizens of the U.S. suspected of terrorist activity would be tried by military tribunals due to the "national emergency" he proclaimed on September 14, 2001. (Greenberg and Dratel, 2005: 25-28) However, does the 9/11 attack, which lasted one day, qualify as a "rebellion or invasion" justifying the suspension of habeas corpus? In addition, on December 28, 2001, two

attorneys in the OLC, John Yoo and Patrick Philbin, wrote a memo for the legal counsel at the Department of Defense, William Haynes, about "possible habeas jurisdiction over aliens held in Guantanamo Bay, Cuba." (Greenberg and Dratel, 2005: 29-37) In the memo, Yoo and Philbin asserted that "federal courts lack jurisdiction over habeas petitions filed by alien detainees held outside the sovereign territory of the United States," the same position espoused by the New Paradigm for the WOT. Eventually, the U.S. Supreme Court disagreed with the Bush administration's legal reasoning and ruled that federal courts did have jurisdiction over the detainees at Guantanamo. But the process of hearing cases was slow and this meant that detainees spent years in detention without charge and without access to an attorney.

Another legal debate involving the extreme positions of the New Paradigm revolved around the fate of an American citizen, Jose Padilla, accused of ties to al Qaeda and plotting to detonate a "dirty bomb." Padilla was arrested as he stepped off a plane in Chicago on May 8, 2002 and President Bush designated him an "enemy combatant" the next month, which meant moving him to a military prison where he was held without charge and without access to a lawyer for three and a half years. His detention became an issue for civil liberty groups who denounced the Bush administration's claim that Padilla could be held indefinitely without charge. The precedent of detaining an American citizen arrested on American soil, far from the battlefields of Afghanistan, and holding him indefinitely without charge struck many legal analysts as an anathema to the common law cases inherited from Great Britain and incorporated into U.S. constitutional law jurisprudence. Padilla's case slowly wound its way through the federal court system and just

as it appeared that the U.S. Supreme Court might issue a ruling that would contradict the Bush administration's preferred legal reasoning, Padilla was transferred from military detention to a federal court and charged with several criminal offenses. Several legal commentators believe the transfer was done to avoid an adverse Supreme Court ruling on the legality of holding citizens in military detention without charge. In the end, the Bush administration did not charge him with plotting to use a dirty bomb but, instead, with conspiracy. In August 2007, he was convicted on all counts. Padilla was sentenced to 17 years and 4 months in federal prison; he later sued John Yoo for authoring the August 2002 "torture memos" which led to the use of harsh interrogation methods. In his lawsuit, Padilla alleges that he was subjected to extreme sleep and sensory deprivation, stress positions, and other illegal forms of interrogation as a result of the "torture memos."

President Obama promised to close the Guantanamo detention facility within one year of taking office, but Congress refused to allocate funding for this purpose. As of June 2012, the prison remains open and is likely to remain so, given the political opposition to moving prisoners to facilities in the U.S. The Obama administration originally stated it would try Khalid Sheik Mohammad in federal court in New York City but had to retract this when it became politically unpopular to try him in a civilian court in New York. The UN High Commissioner for Human Rights, Navi Pillay, expressed concern in 2011 that the U.S., with all the powers at its disposal, has not been able to close Guantanamo and will hold trials in military, not civilian, courts.

Congress has the power to legislate regarding the trial procedures and law-of-war detentions of GITMO prisoners, but it remains reluctant to take the political risks involved in resolving issues surrounding the trial rights and

detention policies of those accused of ties to the Taliban and al Qaeda. According to a Brookings Institution study, this means the U.S. court system, on a case by case basis, must fashion a legal regime for "defining the rules of military detention." Obama's failure to close GITMO indicates that it is difficult to "undo" or reverse a decision made by the previous administration in the WOT, and that subsequent American governments may have to resolve the issues left by GITMO and other detention facilities.

Taken together, these cases reveal the pattern of an assertive executive, willing to stretch legal doctrines to achieve its goals of indefinite detention, coercive interrogations, and maximum flexibility to pursue policies in the WOT. The Bush II administration, true to Koh's concepts on executive initiative and congressional acquiescence, did not seek Congressional input or legislative authorization (except for the Iraq invasion) for its most far-reaching policies. For its part, Congress, until the Democratic Party took control after the elections of November 2006, went along with the administration's agenda. In fact, the research on the previous three administrations and the Bush II administration illustrates that Congress is unlikely to exercise meaningful oversight or control over the executive branch when the President and both houses of Congress are in the hands of the same political party and the issue is national security. Even after the Democrats took control over both houses of Congress in January 2007, the new Speaker of the House, Nancy Pelosi (D-CA.), stated that there would be no impeachment inquiry regarding President Bush, thus nullifying the most potent tool the Congress may exert over the executive branch.

Article II, section 4 of the U.S. Constitution prescribes impeachment of the president, vice president, and civil officers of the U.S. for "treason, bribery, or other high crimes and misdemeanors." Impeachment, which is described as the ultimate weapon Congress has to control the executive branch, is rarely used; only Andrew Johnston in 1868 and Bill Clinton in 1998 have been impeached, and neither was removed from office. Therefore, it is a blunt and cumbersome method of controlling the executive, but when Pelosi withdrew the threat of impeachment after the midterm elections of 2006, the Bush II administration realized it was immune from the most drastic form of legislative assertiveness for the remainder of its term in office. Fein, the Reagan administration lawyer, contended that Pelosi opposed an impeachment inquiry because it would not be good for her political fortunes or the Democratic Party. (Fein Interview and Fein, 2008: 41) In addition, the failure to seriously investigate possible impeachable offenses leaves a dangerous precedent. As he noted, "If Congress does not repudiate the Bush-Cheney abuses and usurpations---perpetrated under the pretense that the nation has been forced to a permanent war footing with international terrorism threatening to bring a Caliphate to Washington, D.C.---a dangerous safe harbor will have been created for their successors in the White House." (Fein expanded on this theme from his book in the interview.)

Fein also discussed the reasons for congressional inaction regarding the excesses of the Bush II administration. For him, there are primarily two explanations; the first is that member of Congress are "generally ignorant of the Constitution's antecedents, history, and philosophy." (Fein Interview and Fein, 2008: 49) The second reason for acquiescing to the executive branch is

the tendency for members to "routinely subordinate the Constitution to party loyalty." (Ibid) In other words, political expediency translates into members of Congress consenting to the president's agenda when they have the same party affiliation. Nothing in the current research contradicts Fein's theory on congressional inaction in the area of national security.

Another interviewee, Louis Fisher, Congressional Research scholar, discussed the interactions between the executive and legislative branches regarding the decision to use military force; he firmly believes committing U.S. forces to military action requires the *collective* judgment of both the President and Congress. For Fisher, the historical record on the Founding Fathers clearly establishes their desire "to circumscribe the President's authority to take unilateral military actions" except in cases where the President had to defend against sudden attacks. (Fisher Interview and Fisher, 2004: 8) In his extensive scholarly research and the interview, Fisher distinguished between offensive and defensive wars. According to Fisher, from 1789 until Truman went to war in Korea without congressional authorization in 1950, the principle regulating the use of force gave the President "certain defensive powers to repel sudden attacks, but anything of an offensive nature (taking the country from a state of peace to a state of war) was reserved to Congress." (Fisher Interview) He noted, "Presidents like to control foreign policy without constraints from anybody. Scholars are to blame, also, for pushing the idea that the president is all-powerful and need not consult with Congress." (Fisher Interview)

Koh, who is now the Obama administration's Legal Advisor of the Department of State, examined why the President "wins" in foreign affairs disputes in his book *The National Security Constitution*. As examined in chapter 3, Koh identified several reasons, including the tendency for the executive branch to take the initiative by construing laws designed to constrain actions as *authorizations* instead. (Koh, 1990: 117) In addition, "Congress has usually complied with or acquiesced in what the president has done, through legislative myopia, inadequate drafting, ineffective legislative tools, or sheer lack of political will." (Ibid) In the cases discussed in this research, two explanations dominate: the first is the lack of political will on the part of members of Congress, particularly regarding regulating aspects of the WOT, and the second is congressional acquiescence in executive branch initiatives. This suggests that future presidents will enjoy a large measure of compliance from Congress regarding policies that employ force in fighting terrorism, especially when the President's party controls both houses of Congress.

The last domestic, political institution that might constrain contemporary Presidents in the realm of foreign affairs is the judiciary. According to Koh, the U.S. courts tolerate presidential initiatives "either by refusing to hear challenges to those acts or by hearing the challenges and then affirming presidential authority on the merits." (Ibid) Although Koh wrote his analysis in 1990, the pattern and problems he discussed apply equally to the Bush II administration and WOT. For instance, the federal courts did eventually rule against *some* of the worst excesses of the Bush II administration's New Paradigm but only when a specific case with an identifiable plaintiff was brought to the courts and rigorously argued by motivated attorneys. The

substantial procedural obstacles that must be overcome before a case will be adjudicated by the federal courts are detailed more completely in chapter 3.

One of the legal principles that the Bush II administration used extensively "to declare that momentous questions about its use of executive power simply could not be adjudicated, in cases from lawsuits involving detainee abuse by the CIA to its warrantless domestic surveillance programs" was the state secrets doctrine. (Savage, 2007: 169) This is actually an evidentiary privilege that the government invokes to avoid the disclosure of material that could compromise national security; it rests on the case *U.S. v. Reynolds (1953)* from the Truman administration. According to one analysis, from January 2001 to January 2009, the "privilege played a significant role in the executive branch's national security litigation strategy. In one case, the administration asserted the state secrets privilege some 245 times." (Donohue, 2010: 55) One of the interviewees, Fisher, explained the danger of the government relying too much on the state secrets privilege to muzzle investigations. (Fisher Interview) Fisher and civil libertarians want the courts to curtail use of the doctrine by having judges review the evidence involving state secrets to determine whether it really does impinge on national security, instead of dismissing the entire lawsuit. As in the original case, *U.S. v. Reynolds*, the state secrets doctrine can be used by the government to conceal malfeasance or embarrassing mistakes.

Currently the courts continue to defer to government claims that adjudication would harm national security. In many cases where the state secrets doctrine is invoked by the Department of Justice, the courts defer to

the government and the case is dismissed, without any finding that the evidence in question actually involved national security. The case *Mohamed et al. v. Jeppesen Dataplan* is an example of the government successfully ending a lawsuit that might have revealed illegality by some members of that government. In 2007, five extraordinary rendition victims filed suit in federal court against Jeppesen, a Boeing subsidiary, alleging Jeppesen participated in the renditions by providing critical flight planning and logistical support to the CIA. The Bush II administration argued that the lawsuit should be dismissed under the state secrets doctrine because further litigation would endanger national security. The Obama administration **adopted the same approach** as the previous administration and urged the court to dismiss the case due to state secrets. In May 2011, the U.S. Supreme Court denied *certiorari* (declined to accept the case), thereby ending the lawsuit. The Constitution Project, a nonpartisan think-tank in Washington, criticized the dismissal of the lawsuit, noting that it gave the Bush II administration "immunity from claims of torture," and they called on Congress "to pass legislation to restore the role of courts as a check on executive power." These cases suggest that meaningful control over executive excess in pursuing terrorists is lacking in the U.S. and will continue to complicate efforts by the U.S. to prevent international terrorism while preserving civil liberties.

Finally, by breaking with the previous three administrations' practices in the areas of detention and interrogation, the Bush II administration record makes it much more difficult for the U.S. to curtail other states if they decide to indefinitely detain suspects or violate international norms regarding interrogations. The work of multilateral organizations such as the UN also

becomes more arduous as far as enforcing human rights standards goes, when the world's superpower flaunts international rules in the name of fighting a "war" on terrorism. The role of international law norms in regulating the use of force is discussed in the section below.

Modification of UN Norms on the Use of Force

The purpose of this research was not to identify legal or illegal uses of force; rather, the primary research question asks whether the second Bush administration's use of force to combat international terrorism was different from the previous three administrations. There is a great deal written in legal journals about the UN Charter and the norms surrounding articles 2(4) and 51 and whether international law was adequate in dealing with the requirements of the WOT. (Garraway, 2006) One school of thought was founded upon the proposition that international law was "completely capable of dealing with the various challenges arising out of the terrorism issue." (Van Krieken, 2002: 9) An opposing view, favoured by the lawyers writing the New Paradigm for the WOT, is that international law, if it exists, can not constrain the U.S. in taking action to protect its nationals, nor was it adequate in dealing with the challenges posed by rogue states and terrorists with WMD. Perhaps the best enunciation of this view is from President Bush in December 2003 when he said, "International law? I better call my lawyer. . . I don't know what you're talking about by international law." (Sands, 2005: 205) This study does not evaluate the validity of these views, but attempts to understand how they might influence an administration's use of force.

One constant theme in the examination of the four administrations is the desire of all the administrations to demonstrate the actions it took regarding the use of force were entirely consistent with international law. So, for example, the Reagan administration justified the bombing of Libya in 1986 to the UN Security Council under the right of self-defence in article 51; the U.S. noted that the bombing was taken to deter future terrorist attacks. (Gray, 2004: 162) Similarly, the Clinton administration invoked the right of self-defence at discussions in the Security Council to illustrate that both the 1993 bombing of Iraqi Intelligence Headquarters in Baghdad and the 1998 missile attacks in Afghanistan and Sudan were lawful responses to terrorism. (Gray, 2004: 163) Note that both Reagan and Clinton were careful to avoid identifying the use of force as *reprisals*, which are generally disfavoured under international law, and both claimed the actions were legal as measures of self-defence. That successive U.S. administrations would attempt to reconcile uses of force with the norms and standards of international law is not surprising, given that most states couch their actions in presumptive legality and the U.S. was instrumental in constructing the legal regime for the use of force after World War II. The contemporary irony is, as explained by Sands in *Lawless World*, the second Bush administration purposefully disavowed the UN Charter's regime for the use of force without proposing an alternative that would work as well as the present regime. (Sands, 2005)

Another theme, which emerges from the study of the four administrations, is the reoccurring school of legal thought justifying the legality of using force to prevent international terrorism. One leading exponent of this school, and member of the Reagan administration, is Abraham Sofaer, former

legal advisor to the State Department (1985-1990) whose writings continue to influence American discourse on this topic. Writing in the 1980's, Sofaer argued that a narrow view of self-defence under international law tended to "give terrorists and their state sponsors substantial advantages in their war against the democracies." (Sofaer, 1989: 91) More recently, he advocated using preventive force to counter threats from terrorist networks before they are imminent, even if the use of force would appear to be illegal. According to Sofaer, the use of force in certain situations would be legitimate, even if not strictly legal under traditional international law. In addition, even though the Bush II administration is gone, Sofaer maintains that the "objective of preventing terrorist threats before they are realized---rather than primarily treating terrorism as a crime warranting punishment after the fact---is now established as an essential element of US national security." (Sofaer, 2010: 109)

In a radio interview in December 2010, Sofaer was asked whether the Obama administration's policies regarding preventing international terrorism and the use of force were a departure from the Bush II administration. He replied that the difference was in "style, not substance." He then elaborated on how both the Bush II administration and Obama administrations ask the same questions before employing force:

a) *Shall we use force to prevent terrorist attacks?*
b) *Shall we attack non-state actors even if they are present in a foreign state?*

c) *Shall we attack without UN Security Council authorization if our national security requires it?*

Left unaddressed is the broader question of whether this manner of preventing international terrorism furthers one of the most important goals underlying the UN Charter regime, i.e. the maintenance of international peace. Other problematic elements of Sofaer's type of counterterrorism policy include whether this policy is available to other states such as Russia or China. Finally, does this policy actually reduce the number of terrorist attacks worldwide?

Customary International Law

The reaction of other states to the U.S. use of force to prevent international terrorism is important and relevant regarding customary international law. Unlike treaty law, which is carefully written in conventions and treaties, customary international law is the result of state practice and *opinion juris*. A rule of customary international law traditionally results from the following: concordant practice by a number of states and the continuation or repetition of this practice over a considerable period of time (state practice); and the conception that the practice is required by prevailing international law and general acquiescence in this practice by other states (*opinion juris*). (Weston, Falk, and D'Amato, 1990: 80) Thus, the reactions of the world community to American assertions on a disputed doctrine of customary international law are factors in determining whether the norms of international law are changing in the direction favoured by the U.S. World reaction to the

American use of force against Libya in 1986 was largely negative, with the UN General Assembly adopting a resolution condemning the U.S. for the attack. (Maogoto, 2005:133) By 1993, the world response to Clinton's use of force against Baghdad for the attempted assassination of the first President Bush was more "tacit acquiescence" and, by 1998, the response from the international community was "mixed" after the U.S. cruise missile strikes in Afghanistan and Sudan. (Ibid) For some legal scholars, this is evidence that the world community acquiesces in the use of force to respond or preempt terrorist activity where the state in which the activity originates is unable or unwilling to curtail the terrorists on its own.

Anticipatory Self-Defence

The doctrine of anticipatory self-defence figures prominently in scholarly discussions of the use of force and the "Bush doctrine." Under the doctrine of anticipatory self-defence, a state is permitted to defend itself *prior* to an actual attack with the use of force as long as certain requirements are satisfied. The requirements are necessity, proportionality, and immediacy. The concept envisions a framework for self-defence in circumstances where a serious threat of armed attack exists; the difficulty of acquiring the correct intelligence about a possible attack and the possibility of states using the doctrine as a pretext for using force first are among the reasons it remains an unsettled area of international law. The theoretical basis for allowing anticipatory self-defence is that it would unconscionable for states to wait until a devastating blow is struck before being lawfully allowed to defend themselves. The doctrine became more imperative, according to some law professors, with the

advent of nuclear weapons that could deliver an overwhelming first strike. As many scholars have noted, the UN Charter and its prohibitions on the use of force were written prior to the ready availability of weapons of mass destruction and the ability of transnational terrorist networks to wreak devastation on the scale of a nation-state.

The requirements of necessity, proportionality, and immediacy are based on an 1837 case called *The Caroline* involving British force on an American ship aiding Canadian rebels. The requirements were expressed as a result of the correspondence between the U.S. and Great Britain after the *Caroline* incident. The agreed formula for a state lawfully claiming self-defence is the state must show a "necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation." This formula is still cited and relied upon despite the passage of time and improvements to modern weaponry. In addition to necessity, proportionality, and immediacy, an "armed attack" must occur or, at least, be imminent before the right to self-defence may be invoked. It is still debatable whether or not the September 11 attacks altered the concept of "armed attack" to include non-state actors such as terrorists in the absence of any state complicity. (Gray, 2004: 165) For most states, the question of whether the use of force by individuals is an "armed attack" is: *has there been a "sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to acts of aggression*." (Nicaragua Case, 1986) The U.S, during the Reagan administration, began to interpret the concept of "armed attack" to

include certain terrorist activities; this occurred as part of President Reagan's response to Libyan inspired terrorism like the La Belle disco bombing in 1985.

Anticipatory self-defence, which is self-defence before an actual attack occurs, is grounded in article 51 of the UN Charter and remains controversial as few states other than the U.S. and Israel invoke it as justification. George W. Bush gave one of the best-known explanations for it in a speech at West Point on June 1, 2002. After first describing why deterrence and containment were not adequate for the post 9/11 world, he said, "If we wait for threats to fully materialize, we will have waited too long. … We must take the battle to the enemy … and confront the worst threats before they emerge." (FN speech) Later that year, the Bush II administration released its National Security Strategy, which used the words prevention and preemption interchangeably, causing confusion about meanings. As Heisbourg wrote, "The ambiguities in the language used by the Bush administration could actually hinder further legal innovations and new interpretations of existing international laws, while a perfectly good case might be made for preemption and, with qualifications, for prevention in existing international legal terms." (Heisbourg, 2003: 79)

To the extent that the Bush Doctrine embraces anticipatory self-defence as a viable and lawful concept, many problems are foreseeable if the world community accepted this as a norm of international law. In place of the relatively clear prohibitions on the use of force in article 2(4) of the UN Charter, there would be more malleable and ambiguous norms regulating when a state may resort to military force in attempting to secure its territory

and nationals against terrorism. For example, allowing the state itself, instead of the Security Council, to determine a threat to international peace exists, and then permitting the state to take action to preempt that threat could result in situations very similar to the pre-UN Charter era with anarchistic uses of force. General dissatisfaction with how the pre-Charter rules were used and abused by states wishing to use force led the international community to adopt clearer regulations after the debacle of WWII. At present, the majority of states do not advocate a return to earlier norms regarding the use of force. It remains to be seen whether future American administrations continue to "push the envelope" as far as acceptance of anticipatory self-defence is concerned.

Afghanistan and the Legal Basis for the Use of Force

Despite the confusion accompanying the notions of prevention and preemption in the Bush Doctrine, there are distinctions between the legal basis for the use of force in Afghanistan and the use of force in Iraq. In Afghanistan, the domestic legal basis for sending U.S. troops was the Authorization for Use of Military Force (AUMF) of September 2001, discussed in detail in the section on Afghanistan. On the international level, the legal basis for using force in Afghanistan rests on UN Security Council resolutions 1368 and 1373. Resolution 1368, adopted on September 12, 2001, immediately after the attacks of 9/11, recognized the right of states to individual self-defence in addition to describing the attacks as a "threat to international peace and security." Less than three weeks later, the Security Council adopted resolution 1373 on September 28, 2001, which expressly affirmed the inherent right of self-defence and called upon states to cooperate

to suppress terrorist acts. Significantly, the Security Council and other international bodies characterized the 9/11 tragedy as “armed attacks,” even though the acts were attributed to a non-state network called al Qaeda. Prior to Resolutions 1368 and 1373, the Security Council had never adopted a resolution explicitly encompassing the right of individual and collective self-defence after a particular terrorist attack. As one law professor wrote regarding the Security Council, the willingness of the UN to “invoke and reaffirm self-defence under article 51 in response to the September 11 terrorist attacks is an important act and for some states, helped legitimize the U.S. military response as a legal use of force.” (Maogoto, 2005: 120)

The U.S. use of force in Afghanistan was joined by other states, notably the UK and many other states, who agreed that force was justified in closing al Qaeda training camps and capturing terrorists in light of the Taliban’s refusal to do so. There was either general acquiescence or agreement to the U.S. assertion of a right to use force in the particular circumstances in Afghanistan, in contrast to the subsequent situation in Iraq. Writing in December 2001 regarding the development of customary international law norms, Kirgis expressed his view that the “absence of challenge to the U.S. asserted right of self-defense could be taken to indicate acquiescence in an expansion of the right to include defense against governments that harbour or support organized terrorist groups that commit armed attacks in other countries.” (Kirgis, 2001) Ten years after the attacks, the problematic issue may be the question of proportionality, as in, is it proportionate for the U.S. military to remain in Afghanistan when the Taliban government no longer exists and al Qaeda no longer has a safe haven there. As noted by several legal

authorities, “there has never been any authoritative definition of what is and what is not a proportional state response to a terrorist attack.” (Dinstein, 2005: 184)

Iraq and the Legal Basis for the Use of Force

The use of force in Iraq represents an entirely different situation as there had been no “armed attack” from the state of Iraq or any terrorist groups operating within Iraq against the U.S. (Note the last known terrorist act by Iraq against the U.S. was the attempted assassination of George H. W. Bush in 1993.) For domestic legal purposes, the Authorization for Use of Military Force against Iraq passed by Congress on October 16, 2002, provided the basis for sending American troops to Iraq in March 2003. Unlike the use of force in Afghanistan, the invasion of Iraq has generated much more legal uncertainty regarding international law. There are many UN Security Resolutions concerning Iraq, its invasion of Kuwait in 1990, and the UN inspections to ensure compliance with the weapons regime. The most relevant for this research is Resolution 1441 adopted unanimously in November 2002 after intense lobbying by the Bush II administration. Resolution 1441 “deplored” the absence of weapons inspections by the UN in Iraq since December 1998 and gave Iraq a “final opportunity to comply with its disarmament obligations under relevant resolutions of the Council.” It ended with a reminder that “the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations.” However, it did not make the use of force against Iraq to enforce previous resolutions automatic.

The UK and other states advocated a second UN resolution specifically authorizing force before the invasion, but it became increasingly clear that other states, such as France and Russia, would block the adoption of a second, stronger resolution. The Bush II administration later claimed that a second UN resolution was unnecessary; this position is not widely held among the world community nor supported by scholarly opinion. Condoleezza Rice claimed in *No Higher Honor* that the U.S. had simply run out of options for dealing with Saddam Hussein and Iraq, thus forcing the U.S to resort to the military option. (Rice, 2011) For the Bush II administration, the legality of using force in Iraq stemmed from a variety of factors including Iraq's unwillingness to allow further weapons inspections, Iraq's alleged ties to terrorist groups, and Iraq's past use of chemical weapons, which, according to President Bush and other administration officials, indicated a willingness to share WMD with terrorist networks like al Qaeda. At a speech in Ohio, President Bush claimed, "We know that Iraq and al Qaeda have had high-level contacts that go back a decade. Some al Qaeda leaders who fled Afghanistan went to Iraq." Although the asserted links between Iraq and al Qaeda seemed tenuous in 2002 and early 2003, the Bush II officials continued to cite them as an urgent reason compelling the U.S. to strike first, before Iraq gave al Qaeda WMD or associated technology. It is now evident that the "high-level contacts" President Bush spoke of never existed. Despite the fact that many things President Bush and his administration cited as reasons for invading Iraq later turned out to be false, the administration has always maintained that the invasion of Iraq was lawful.

According to the legal analysis of the lawyers in the Bush II administration, the invasion of Iraq was lawful on two independent grounds. John Yoo wrote an examination of the war's legality and claimed the first legal ground rests on previous UN Security Council resolutions to implement the cease-fire agreement that suspended the hostilities in the 1991 Gulf War. Iraq was in material breach of the terms of the cease-fire, permitting the U.S. and its allies to suspend the operation of the cease-fire and use force to compel Iraqi compliance. The second legal ground is the doctrine of anticipatory self-defence. As Yoo wrote, "international law permitted the use of force against Iraq in anticipatory self-defense because of the threat posed by an Iraq armed with WMD and in potential cooperation with international terrorist organizations." (Yoo, 2003: 575) Needless to add, this analysis is not widely shared outside of the U.S. The dangers in using the second legal ground, anticipatory self-defence, generate caution on the part of the rest of the international community, where fears of returning to a permissive use of force regime inhibit policy makers and those who seek to avoid international conflict.

Expansion of Executive Power

This section will examine the expansion of executive power which occurred during the Bush II administration, especially those aspects related to policies in the WOT. It also discusses the ramifications of the absence of accountability for abuses of power during that administration and attempts to predict future behaviour regarding American presidents who confront acts of international terrorism. At the start of President Obama's term, a Yale law professor wrote that the big question was whether the new president would

ensure that future presidents could not use “the precedents of the Bush years as a springboard for even more extreme assertions of executive authority.” (Ackerman, 2009) These precedents include conducting a warrantless wiretapping program, relying on the president’s inherent powers to detain and interrogation suspects without congressional oversight, and heavy reliance on the doctrines of executive privilege and state secrets. While some of these pertain more to domestic issues of governance, others were part of the collective campaign known as the WOT and were part of the Bush II administration’s governing model.

In what may be the most surprising finding of this research, given that it involves a political system that champions and celebrates checks and balances among the various branches of government, the evidence from the four administrations reveals a lack of real, domestic constraints on an executive when that executive intends to increase its powers in the realm of national security. As Donohue notes, “in the face of terrorism the legislature’s and the judiciary’s ability to offset the executive is severely diminished.” (Donohue, 2008: 11) She also argues that the “drive to increase power is a function of the office, not of the political affiliation of those in power.” (Ibid)

The administrations in this study, three Republican and one Democratic, share many tendencies as far as responding to terrorism is concerned. For example, all four presidents viewed the War Powers Resolution as unconstitutional and, in practice, no real constraint on their power to insert U.S. military forces into hostilities, despite the stated intent of the Congress when the WPR was passed in 1973. The militarization of U.S.

foreign policy with the concordant upward trend in funding the U.S. military is evident during all four administrations in this research. All four presidents used military force to respond to international terrorism, except George H.W. Bush (and that may be partially explained by the fact that he was a one term president; he certainly agreed with its use in principle). Additionally, whenever the president uses military force in a counterterrorist campaign, from Reagan's bombing of Libya, to the raid on bin Laden's compound, the American public overwhelmingly supports the use of force. As Bacevich notes, "The American public's ready acceptance of the prospect of war without foreseeable end and of a policy that abandons even the pretence of the United States fighting defensively or viewing war as a last resort shows clearly how far the process of militarization has advanced." (Bacevich, 2005: 19)

However, despite these tendencies, it would be a gross oversimplification to write that the Bush II administration and its use of force broke no new ground vis-à-vis the previous three administrations and terrorism. Pfiffner noted that President Bush was "not the first president to take an expansive approach to his constitutional authority." (Pfiffner, 2008: 231) However, Bush went beyond previous Presidents and "he claimed that his constitutional authority as president allowed him to act independently of the other two branches of government and to avoid oversight by them." (Ibid) The final chapter returns to the research questions and analyzes the findings to explain this characterization of the Bush record.

Winkler examined the second Bush administration's marshalling of terrorism rhetoric to justify the expansion of Commander-in-Chief powers. By

comparing the 9/11 attacks with “two key historical moments when the United States had been under attack: the War of 1812 and Pearl Harbor,” George W. Bush was able to make the case that a major incident called for broad powers to protect the country. (Winkler, 2006: 168) Additionally, the administration compared al Qaeda to the communist menace of the Cold War, thereby implying that the terrorist network was a global danger committed to spectacular destruction. (Ibid) While Reagan, Bush senior, and Clinton all spoke about the dangers of terrorism, no previous administration worked in the climate of continuing crisis that engulfed the Bush II administration from 9/11 onwards. The fear of more al Qaeda attacks, the anthrax attacks, the attempted shoe bombing by Richard Reid, and other near-misses exacerbated the administration’s propensity to maintain a “state of war” mentality.

Lack of Constraints

The lack of constraints on the executive’s actions vis-à-vis the application of force for counterterrorism is striking. In theory, according to the Framers of the U.S. Constitution, the legislative or judicial branch or both would work as a check on executive branch agendas but the history of the past four administrations reveals this has not worked in practice. Another constraint on the president is law, specifically the domestic laws and international laws that exist to regulate the use of force, the treatment of detainees, and other issues surrounding hostilities. International law is explored more fully in the section on the UN and international norms. An examination of the historical record of the Bush II administration clearly reveals few constraints. Domestic U.S. law, while enjoying a better reputation

than international law during the second Bush administration, was not a significant restraint on many areas in the WOT. To name but a few: federal law prohibiting torture was defined by lawyers working on the New Paradigm to permit the waterboarding of detainees; FISA, the law overseeing wiretaps, was interpreted or bypassed, allowing the Bush administration to ignore its provisions on wiretapping; and the WPR, enacted to limit presidential military adventures without the input of Congress, did not work as intended to increase meaningful legislative consultation on the deployment of US military force.

Shortly before George W. Bush left office in January 2009, the House Judiciary Committee issued a critical report on his presidency. It systematically listed many practices of that administration, noting, "The ambitious reach of the Bush Administration's imperial vision, the audacity with which it was pursued, and the extent to which its pursuit was acquiesced in, is unprecedented in our Nation's history. But the imperial impulse – and the dangers it poses to democracy, the rule of law, the public welfare, and international peace – are all too familiar to students of world history."

Unlike the Reagan, Bush I, or Clinton administrations, the second Bush administration consciously attempted to establish a New Paradigm for fighting international terrorism. The goal was **maximum flexibility** for the administration in dealing with detainees, fashioning interrogation methods, and implementing governing methods. The administration planned to evade habeas corpus litigation in U.S. federal courts by building Guantanamo prison on the island of Cuba. In a similar fashion, the administration seized on the

term “unlawful combatant,” which is not generally defined in international humanitarian treaties, as useful terminology to describe a class of detainees. The evidence reveals the Bush II lawyers believed this group of detainees could be held indefinitely, with fewer rights than those who are designated “prisoners of war.” According to Paust, “what has especially marked the Bush administration’s ‘war’ on terrorism are the violations of customary and treaty-based international law that have been authorized and abetted in connection with the detention, rendition, treatment and interrogation of human beings within and outside of the united States.” (Paust, 2007: 45) This effort to achieve maximum flexibility in the war on terror is an important dimension distinguishing the Bush II administration from the other administrations.

Plebiscitary Presidency

The best explanatory model for the Bush II executive may be a “plebiscitary presidency.” In his groundbreaking work on the Nixon years, Schlesinger described a type of elected monarch or plebiscitary presidency in *The Imperial Presidency*. This type of presidency meant holding the president “accountable only once every four years, shielded in the years between elections from congressional and public harassment, empowered by his mandate to make war or to make peace, to spend or to impound, to give out information or to hold it back, superseding congressional legislation by executive order, all in the name of a majority whose choice must prevail till it made another choice four years later---unless it wished to embark on the drastic and improbable course of impeachment.” (Schlesinger, 2004: 255) Schlesinger viewed foreign affairs as the area where the constitutional

balance among the branches of the US government was most likely to be disturbed. Moreover, an international crisis gave any president the opportunity to exercise inherent powers and assert almost royal prerogatives. This describes the Bush II administration in many aspects; once the Supreme Court decided that George Bush won instead of Al Gore in 2000, his administration governed as though he could not be held accountable until the 2004 election. In addition, the 9/11 tragedy was the international crisis that enabled him to exercise inherent powers, facilitating his use of force in Afghanistan, Iraq, and to a lesser extent, Pakistan and other countries where drones have been deployed to kill al Qaeda and Taliban suspects.

Some constitutional law scholars and commentators build upon Schlesinger's analysis of the presidency and predict that the powers of the modern presidency will continue to grow unabated by the political checks intended by the Founding Fathers. For instance, Ackerman writes, "while Schlesinger was prophetic in sounding the alarm, it [the presidency] has become a far more dangerous institution during the forty years since he wrote *The Imperial Presidency*---and these threatening trends promise to accelerate over the decades ahead." (Ackerman, 2010: 6) The excesses of the Nixon administration led directly to congressional hearings like the Church Committee and institutional efforts to ensure the president did not overstep his authority, both domestically and in foreign affairs. In contrast, the Bush II administration has resulted in a few congressional hearings but no major investigations or institutional reforms to ensure that succeeding presidents do not borrow from the precedents of the WOT, either for domestic use

(warrantless wiretapping) or in expanding foreign projections of American power. For the student of history, this lapse can only be worrisome.

Another significant legacy of the Bush II administration is the fate of many senior officials who took questionable actions on behalf of prosecuting the WOT. Unlike officials from the Nixon White House, who were convicted of various criminal offenses and punished, very few Bush II administration officials have been held accountable. Nixon himself famously resigned in 1973 to avoid impeachment. President Bush and Vice President Cheney, on the other hand, have admitted publicly to personally approving waterboarding without concern over repercussions. As Bush wrote in his book, *Decision Points*, the "Department of Justice and CIA lawyers conducted a careful legal review," concluding that it "complied with the Constitution and all applicable laws, including those that ban torture." (Bush, 2010: 169) In addition, none of the lawyers responsible for fashioning the New Paradigm for the WOT have been sanctioned for their questionable lawyering. For example, Bybee became a federal judge while Yoo continues teaching at a prestigious law school and writes numerous op-eds for the *New York Times*, *Wall Street Journal*, and other leading newspapers. The Office of Professional Responsibility at the Department of Justice did a five-year investigation of Bybee and Yoo and found they were guilty of "professional misconduct." This meant they might have been subjected to disbarment, resulting in the loss of their law licenses, but in 2010, the Obama administration repudiated the conclusion, thereby leaving the men free to practice law and, perhaps, advise the next Republican administration. The total lack of accountability regarding upholding the rule of law and ensuring respect for democratic principles

leaves incentives for future administration officials who feel obliged to stretch legal doctrines and bend laws.

Overall, the costs of fighting terrorism with the use of force in the manner of the Bush II administration indicate that they do not outweigh the benefits. The evidence detailing the erosion of civil liberties, deterioration of UN norms, and expansion of executive power combine to support preventing and responding to terrorism with an emphasis on a law enforcement paradigm or a blended diplomacy/war/law enforcement model, not the "war on terror" approach advocated by President Bush. The current administration appears on a rhetorical level to embody a change in counterterrorism policies and yet, it has increased the use of drones, even in countries where the U.S. is not at war (Pakistan), and embraced war paradigm legal justifications for killing bin Laden. In addition, the Obama administration has not closed Guantanamo, will be trying some accused terrorists in military tribunals, and keeps open the possibility of indefinite detentions. These indicate it is either unwilling or unable to comprehensively change the direction charted by the Bush II administration. Moreover, this research also indicates that the legislative branch will usually acquiesce in initiatives undertaken by the executive branch, while the judiciary will continue to tolerate executive initiative, only rarely intervening to check the most egregious assertions by the executive. Needless to add, these are worrisome trends for a liberal democracy such as the U.S.

Chapter 9
Conclusion

The final chapter returns to the research questions and ties together the different strains and themes of the thesis. The primary question, *was the Bush administration's use of force to combat international terrorism different from previous American administrations*, cannot be answered without considerable nuance. There were important similarities, including the continuity of counterterrorism tools across all four administrations. In addition, Congress, although ostensibly jointly responsible with the executive branch for the formation of national security decisions, particularly those involving war powers, usually complied with the executive's program and the courts rarely intervened. This confirms the vitality and validity of Koh's pattern regarding national security decision-making of executive initiative, congressional acquiescence, and judicial tolerance.

Finally, this thesis examined the administrations' actions from two legal perspectives: the international legal regime for the use of force, and the domestic law granting the President the constitutional authority to employ U.S. forces. It argued that international legal norms and domestic laws on the use of force were not significant constraints on the Presidents' ability to exercise force which characterized all four administrations.

However, despite the similarities, the Bush II administration was different in several important ways from the previous three administrations. This thesis examined how a "perfect storm," -the combination of fear induced by the 9/11 tragedy, public acceptance of secrecy and ongoing emergency

circumstances, and specific individuals in the Bush administration committed to enlarging the powers of the executive branch- occurred which facilitated the implementation of the "war on terror." Specifically, close examination of the primary and secondary sources and the interviews conducted for this thesis indicated that the administration's embrace of a war paradigm, instead of a law enforcement approach to counterterrorism, tied in with the administration's goals for a unilateral foreign policy and expanded executive branch authorities. While the second Bush administration borrowed many concepts and doctrines from the Reagan administration, it went further in its articulation and implementation of executive branch war powers. One of the most important results from this research is, despite the existence of restraints like the American system of checks and balances, nothing stopped the second Bush administration from implementing its "war on terror." The next section begins with a consideration of the research questions articulated in chapter one.

Research Questions

The primary research question was augmented by several secondary research questions. The first question was: *What was the administration's policy on the use of force to prevent international terrorism?* A related inquiry was: *who were the key players in the administrations and were there major differences between the departments regarding the use of force?* Answering these questions involved examining the four administrations' rhetorical and operational policies towards the "crime versus war" dichotomy defined in the literature review chapter. As explored in chapter 4 on the administration of Ronald Reagan, President Reagan declared a policy of "swift and effective

retribution" against terrorism; however, as detailed in that chapter, the administration pursued this more in its rhetoric than in practice. Reagan ordered the bombing of Libya in 1986 to deter further acts of terrorism. This was a watershed event in that Reagan used military force in a counterterrorist operation, despite objections from the international community. Several key players in Reagan's administration, including his legal adviser to the State Department, Abraham Sofaer, advocated the "proactive" or war against terrorism approach. The major differences between key players in Reagan's administration, examined in chapter 4, involved the dispute between Secretary of Defense Caspar Weinberger who opposed military action against terrorism and Secretary of State George Shultz who viewed terrorism as a form of warfare. The Reagan administration and its "war against terrorism" paradigm exerted a great deal of influence on subsequent administrations, particularly the Bush II administration.

Chapter 5 explored the administration of the George H. W. Bush and one of its paradoxes. While the policy statements from that administration indicated that it might favour a war paradigm as opposed to a law enforcement approach to terrorism, in fact, the administration did not use force in combating terrorism, even after the Lockerbie and UTA 772 bombings. Instead, the first Bush administration, in cooperation with Great Britain, indicted and eventually tried two Libyans for the Lockerbie bombing. Explanations for this paradox were developed in that chapter and included the urgency of responding to other international crisis in the early 1990's, the fact that George H. W. Bush was a one term President, and Bush's own personal beliefs in fostering a new world order where UN norms would be enforced via multilateral action.

During the administration of Bill Clinton, the subject of chapter 6, there was movement back towards a nuanced law enforcement approach to international terrorism with members of the Clinton administration pursuing indictments, arrests, and criminal convictions as a method of reducing terrorism. For instance, the perpetrators of the first World Trade Center bombing were tried, convicted, and sentenced to life terms. The most important disagreement regarding counterterrorism during the Clinton years was the personal tension between the FBI director, Louis Freeh, and Clinton; this animosity extended across all areas of policymaking. Despite the emphasis on law enforcement methods, Clinton did use force against international terrorism; the first incident occurred in 1993 after the attempted assassination of George H. W. Bush. The second use of force in a counterterrorist operation under Clinton, the 1998 cruise missile attacks against Afghanistan and Sudan, was in retaliation for al Qaeda's truck bombings of U.S. embassies in Africa.

Chapters 7 and 8 analyzed the administration of George W. Bush and his "war on terror" in great depth. After 9/11, the administration's advocacy of more aggressive and proactive counterterrorist operations, instead of the law enforcement methods derided by Bush surrogates, built upon earlier precedents from the Reagan administration. As a result, the administration sent ground troops to Afghanistan to "take the war to the enemy" and find Osama bin Laden. In addition, the second Bush administration's ability to merge the public's fears of al Qaeda, anxieties about WMD possession by terrorists, and the threat posed by Saddam Hussein's Iraq, facilitated its drive to effect regime change in Iraq. As detailed in chapters 7 and 8, President Bush's counterterrorism policies dovetailed neatly with the plans of many in

his administration, particularly Vice President Cheney, to expand executive branch power. According to the interviews conducted with former members of the Bush II administration, one major area of disagreement occurred shortly before the invasion of Iraq, when Secretary of State Colin Powell and his Chief of Staff, Lawrence Wilkerson, insisted upon reviewing all the intelligence Powell used for his speech to the UN in February 2003. As Pillar wrote, the administration used pre-war intelligence "not to inform decision-making, but to justify a decision already made." (Pillar, 2008: 234) Although the research concluded at the end of the Bush II administration, some preliminary comments about the Obama administration are offered, based on the experiences of the previous four administrations.

Role of Congress

The next secondary question from chapter one asked: *what was the role of Congress in making the administration's use of force policy?* In formulating responses to this question, this thesis built upon the foundations of Koh's theory about a national security constitution, which forms the basis for chapter 3. The major premise of Koh's book was that fundamental defects exist in the structure of the American national security decision-making process. Furthermore, foreign policy-making, including war powers, was originally based upon the principle of "balanced institutional participation," meaning that all three branches of government had roles in foreign relations. (Koh, 1990: 72) Most foreign relations decisions fall into the sphere of concurrent authority, which the president manages, subject to checks provided by congressional consultation and judicial review. However, since Vietnam this system of balanced policy-making has been superseded by a

pattern of executive initiative, congressional acquiescence, and judicial tolerance. The research applied this to the phenomena of international terrorism where a crisis environment, public demands for action, and congressional politics exacerbate the tendency of the executive branch to take the initiative and ignore the benefits of balanced institutional policy-making. During the second Bush administration, one might say an executive branch on steroids pushed forward with plans for a "war on terror" without input from the other branches of government. However, the pattern identified by Koh was present in all the administrations.

The lack of meaningful congressional oversight and guidance in the formation and implementation of programs in the "war on terror" came up frequently during the interviews. For instance, Pillar mentioned the need for Congress to set standards and regulations regarding the use of drones to target individuals suspected of terrorism. (Pillar Interview) The issue of when an American citizen suspected of terrorism may be targeted remains controversial, and the killing of Anwar al-Awlaki on September 30, 2011 increased the controversy. Both al-Awlaki and his 16-year-old son, who was killed in a drone strike in October 2011, were U.S. citizens. These men were not the first U.S. citizens killed by drone. That happened in November 2001, over ten years ago, so Congress has had ample time to study the issue and pass legislation or other guidelines. Moreover, many non-citizens have been killed by drones since 9/11, as detailed in chapter 7. By failing to regulate when the President may lawfully order citizens and others killed by drones, Congress allows the executive branch to formulate and implement its own policies on targeted killings. Thus far, the judicial system has not been

significantly involved to serve as a check on executive initiatives due to the state secrets privilege and other doctrines.

Several interviewees also discussed the failure of Congress to adequately oversee the policies on indefinite detention and "ghost detainees." Other interviewees were critical of members of Congress for putting their political party affiliations higher in their priorities than the Congress as an institution. Fein, for example, stated that individual members of Congress lacked enough knowledge about the American system of checks and balances to challenge the executive branch when it needed to be challenged and checked. (Fein Interview) According to him, this was a dangerous path for the U.S. and could result in the end of the country as a republic. (Ibid)

All of the interviewees, even those who served in the second Bush administration, expressed some scepticism about the conduct of the "war on terror," whether it was the drone program, detention policies, or the intelligence that led to the Iraq invasion in 2003. In general, their attitudes indicated great anxiety about George W. Bush's counterterrorism policies and the ability of future administrations to handle the problem of terrorism in light of the precedents left by the Bush II administration. In recording their responses to the research questions, Fromkin's analysis of the strategy of terrorism took on new relevance. Fromkin wrote that terrorism is a "sort of jujitsu" in which an opponent's own strength is used against him by the terrorist group. "By itself, . . . terror can accomplish nothing in terms of political goals; it can only aim at obtaining a response that will achieve those goals for it." (Fromkin, 1975: 11) Many of the interviewees noted that al Qaeda could not defeat the U.S militarily, but al Qaeda could prompt the U.S.

to overreact with the use of military force and thereby spend too much on wars and discreet military operations, while at the same time damaging America's reputation.

International Legal Constraints on the Use of Force

In seeking to compare and contrast the Bush II administration with the previous three administrations, the research questions also probed the legal constraints on the use of force. This was part of the multidisciplinary focus of the research detailed in chapter one. Specifically, one research question focused on international legal norms with this question: *did international legal norms on the use of force operate as a constraint in the administrations?* As the chapters on the Reagan, Bush I, Clinton, and Bush II administrations clarified, the UN Charter sets forth the parameters for the use of force in the post-WWII era including the prohibition on the use or threat of the use of force under article 2(4). Article 51, however, acknowledges that states continue to exercise the inherent right of individual or collective self-defence if an armed attack occurs.

The U.S has interpreted these norms broadly to allow various uses of force in response to terrorist attacks, which the U.S. deems are serious enough to qualify as "armed attacks." Therefore, for example, Reagan bombed Libya in 1986 after a series of bombings and provocations by Gaddafi, which the Reagan administration construed as an "armed attack." Clinton opted for force twice as counterterrorism operations: the first time, in 1993, after the attempted assassination of President George H. W. Bush, and then in 1998 when he ordered cruise missiles after al Qaeda bombed two embassies in Africa. The Clinton administration argued that these were lawful

uses of force under Article 51 and the doctrine of self-defence. Then the Bush II administration, building on these foundations, used a war paradigm to launch its military action against Afghanistan after 9/11. The most disputed use of force was, of course, the invasion of Iraq in 2003, which was linked to the campaign against al Qaeda by the second Bush administration. As detailed in the chapters, international legal norms did not significantly constrain the administrations, although they may have influenced how the administrations explained and justified their uses of force to the world community.

American Legal Constraints on the Use of Force

The next research question also concentrated on legal aspects of the problem and revolved around American domestic factors. The research question was: *did American legal norms on the use of force operate as a constraint in the administrations?* This inquiry focused on whether the President had the constitutional authority to use force and involved examinations of the War Powers Resolution (WPR), the National Security Act, and several authorizations for the use of force. Since the WPR became law in 1973, Presidents in all the administrations have declared it an unconstitutional intrusion into the executives' war powers, but they have issued war powers letters to Congress anyway, often in pro forma manner. (Baker, 2007: 184) The WPR requires consultation prior to introducing U.S. forces into hostilities, but "consultation" under the WPR has dissolved into informing select members of Congress shortly before the use of force begins. Under these circumstances, the WPR, despite what its drafters intended, is no real check on the executive branch when it decides to use military force. In fact, as Koh

noted in his book, the executive branch often construes statutes meant to constrain executive branch initiatives as authorizations. (Koh, 1990: 117)

The second Bush administration clearly followed the precedents established by other administrations vis-à-vis the WPR and other practices intended to increase executive branch power. In addition, this administration utilized the words in the Authorization for the Use of Military Force against Terrorists (2001) and the Authorization for the Use of Military Force against Iraq (2002) as broad authority to detain suspects, interrogate them with unconventional methods, and other actions (wiretapping without warrants) not contemplated by Congress when it passed both authorizations. Under the American system of checks and balances, the legislature would, in theory, serve as a check on executive branch excesses, but in the area regarding the use of force in counterterrorism, there is very little evidence this operated as envisaged.

Common Themes

The final research question from chapter one posed the question: *are there common themes in the four administrations?* Several themes are common from the administrations studied in this thesis and have been identified in chapters 4 through 8. The most compelling themes are the increasing reliance Americans put on the U.S. military to accomplish non-traditional goals, the emergence of a large executive branch national security apparatus, and the effects of technology on responses to terrorism by the four administrations. The first, the increasing tendency of Americans to rely on the U.S. military for all types of operations, including counterterrorism, concerns both liberals and conservatives in intellectual circles in the U.S. Bacevich, for

example, warned that overconfidence in the U.S. military and its capabilities combined with a mission to spread American values all over the globe is a recipe for imperial overstretch. (Bacevich, 2005) Maddow, from the left of the political spectrum, analyzed the drift towards unending wars that involve exorbitant funding without substantial gain, or input from the American people. (Maddow, 2012) As Lawrence Wilkerson pointed out during an interview, the military is a very blunt tool, but increasingly Presidents see it as their best option for solving international problems. (Wilkerson Interview)

The second theme, the emergence of a large and unwieldy national security apparatus in the executive branch since passage of the National Security Act in 1947, formed the core of several works exploring executive branch power. For example, Wills traced the enlarged powers of the President in the post-World War II environment to the invention of the atomic bomb, accomplished with an atmosphere of secrecy that Americans have come to accept, and with an enormous destructive power that is unmatched. (Wills, 2010) Another scholarly work explored the contemporary "emergency state" where the CIA, Department of Defense, and White House National Security Council coordinate policy to respond to the never-ending emergencies in the pursuit of total security; the emergencies began with WWII, continued with the Cold War, and have now morphed into the war on terror. (Unger, 2012) The huge costs of an emergency state and its many bureaucratic agencies monitoring all aspects of security form the core of another recent work that questioned whether proper, democratic oversight of such a large and secretive bureaucracy is possible. (Priest and Arkin, 2011) Several interviewees commented on the expanding and typically secret agencies that were established by the executive branch, many after 9/11, to

ostensibly “enhance American security.” (Donohue Interview, Fein Interview, Interviewee A, and Wilkerson Interview) One question suitable for further research is the extent to which this is in the long-term interests of either real security or democratic institutions.

The final theme, the effects of technology on responses to international terrorism, is particularly germane to the contemporary reliance on drone technology as a means of counterterrorism. As detailed in the Reagan chapter, Reagan ordered a bombing raid on Libya in 1986 using 45 U.S. military aircraft in Operation El Dorado Canyon. In addition to civilian casualties on the ground, two U.S. Air Force captains were killed when their F-111 fighter bomber crashed in the Gulf of Sidra. At the time, the Reagan administration claimed this was a precision bombing, but clearly the technology available resulted in civilian and military (both Libyan and American) deaths.

In the next decade, the Clinton administration employed newer technology when it launched cruise missiles against Iraq in 1993, and against Afghanistan and Sudan in 1998 after terrorist incidents. The cruise missiles were perceived as more efficient technology due to their precision targeting and the fact that no American military members were put directly at risk by flying over the targets. However, the cruise missiles “delivered limited punch, and it took roughly six hours to get a presidential authorization to fire, then program the missiles, spin their gyroscopes, and finally fly them to the target,” which meant the terrorists could escape. (Benjamin and Simon, 2003: 294). According to Coll, after the 1998 embassy bombings, the Clinton White House worked on obtaining good intelligence from tribal sources in Afghanistan on

the location of bin Laden. (Coll, 2004: 421) Eventually, the counterterrorism office reduced the time frame "from a presidential order to missile impact in Afghanistan to as little as four hours." (Ibid) Nevertheless, the Clinton administration was unable to use cruise missiles to significantly destroy al Qaeda's leadership by killing bin Laden.

As examined in the section on discreet military operations in chapter 7, drones were used by the Clinton administration for intelligence and surveillance. After the 9/11 attacks, the second Bush administration embraced drone technology as an innovation in precision bombing in the "war" it declared against terrorism. In November 2001, a drone strike killed al Qaeda's military commander, Mohammed Atef, in Afghanistan. One year later, in November 2002, the first drone strike outside of the Afghan battlefield occurred in Yemen as the man suspected of planning the USS Cole bombing was killed, along with five other men, including an American citizen. The second Bush administration, seemingly without consultation with Congress, expanded the use of drones so that they could cover territories far beyond traditional battlefields and target anybody, including U.S. citizens. The administration calculated that the advantages of drone technology, particularly their ability to take immediate action without placing American military personnel at risk, outweighed the risks of civilian deaths and alienating populations subjected to drones.

By 2008, the second Bush administration extended drone strikes to incorporate "signature strikes" in which anonymous men are targeted based on their behaviour as militants, in addition to the targeting of specific, named individuals. This permitted the U.S. to target convoys of vehicles in Pakistan, if

the risk to civilians was deemed low, when they bore the characteristics of al Qaeda and Taliban leaders on the run. (Schmitt and Sanger, 2008) Clearly, the technological advances from the bombing raid against Libya in 1986 to the deployment of drones in the "war on terror" were considerable but the precision of drones remains dependent on the sufficiency of intelligence applied in their targeting.

The Obama administration, building on the drone program it inherited from the Bush II administration, increased the use of drones and now deploys them in Yemen and Somalia. Considerable issues regarding drone use remain including their legality under the norms of international human rights law, their coordination with broader American foreign policy goals, transparency, and oversight. (Zenko, 2013: 9) Despite the questions regarding their use, most foreign policy analysts expect the U.S. to continue to rely on drone technology as its primary counterterrorism tool.

The Perfect Storm of the Bush II Administration

As this thesis argued, despite some similarities, it would be a gross oversimplification to write that the Bush II administration and its use of force broke no new ground vis-à-vis the previous three administrations and terrorism. First, an expansion of executive power is part of a larger pattern evident in many governments confronted with the problem of terrorism, but this trend was acerbated in the Bush II administration by officials who advocated expanding executive power and established the New Paradigm for the WOT. President George W. Bush selected many officials dedicated to increasing the power of the President like Vice President Dick Cheney for his administration. Cheney explicitly advocated expanding the power of the

president, even before the tragedy of 9/11 provided the opportunity. Others in the Bush II administration believed in enlarging executive branch power, including Donald Rumsfeld, John Yoo, and Alberto Gonzales. Cheney's staff supported these goals, particularly David Addington and Scooter Libby, and these personalities combined with the 9/11 attacks resulted in the "perfect storm" for expanding the powers of the executive branch.

The New Paradigm borrowed from, and expanded upon, legal concepts and theories from the Reagan administration and many of the junior lawyers in the Reagan administration returned to government service under the Bush II administration. The second Bush administration gave new life to the unitary executive theory and signing statements. These were used to justify a number of contentious policies like invalidating McCain's amendment banning torture in 2005 with a signing statement intended to give the President the power to construe the amendment as he wished. An expansive interpretation of the doctrine of anticipatory self-defence, articulated by Reagan's State Department Legal Advisor Abraham Sofaer, reappeared in Bush II administration justifications for invading Iraq. Theories extolling the ability of the executive to take action in national security without significant input from the legislative branch formed the basis for Cheney's minority report in the Iran-Contra scandal and reappeared in the second Bush administration as a roadmap. As summarized by Fisher, the theory underlying the Bush administration's view of executive power to initiate war is that there are "only two legislative constraints: impeachment and the power of Congress to deny funds after the president take the country to war." (Fisher Interview)

President Bush, who called himself a war President, wrote, “we had to fight this war on the offense, by attacking the terrorists overseas before they could attack us again at home.” (Bush, 2010: 137) He often cited his Commander-in-Chief and inherent powers under the U.S. Constitution when taking controversial actions in the WOT. None of the previous three administrations went so far or pressed so hard to establish precedents for an unfettered President in national security policy-making. When combined with the administration’s assumptions that the battlefield was worldwide and the war was potentially endless, the result was a plebiscitary president, accountable to the electorate every four years only, with inherent powers to pursue aggressive use of force operations against suspected terrorists and state supporters of terrorism all over the world, with very few constraints.

The final way in which the Bush II administration differed from the previous administrations was the sheer scale of the use of force. Presidents Reagan and Clinton merely used discreet bombing missions and short applications of force in their counterterrorist campaigns. On the other hand, President George W. Bush sent ground troops to both Afghanistan and Iraq and claimed the authority to effect regime change in rogue states attempting to acquire WMD. The administration also asserted the right, in the 2002 National Security Strategy, to use force preemptively against “rogue states and terrorists,” thereby making military preemption a legitimate strategy. The use of force in Afghanistan transformed from a small operation to capture al Qaeda and topple the Taliban government into a prolonged counterinsurgency campaign; more than ten years after the 9/11 tragedy, the U.S. remains there. The invasion of Iraq, which occurred after “intelligence was used selectively to support the president’s decision to go to war, and the intelligence was in some

ways politicized," was envisioned as a shock and awe campaign that would quickly find WMD and change the regime. (Pfiffner and Phythian, 2008: 4) The invasion of Iraq in 2003 stands as proof of President George W. Bush's belief in his administration's rhetoric about "going on the offense," in contrast to previous administrations that did not launch ground wars in the same manner.

In fact, the Bush II administration embraced a war paradigm that diminished the importance of law enforcement methods in containing terrorism and began two real wars to counter the threat posed by al Qaeda. None of his predecessors went that far, and it remains to be seen if future Presidents can walk back counterterrorism to more of a law enforcement approach without being labelled "weak" on national defence. One pertinent question for further research is the extent to which the Obama administration's use of drones will become the norm in counterterrorist operations in the future and how other states will adjust. If another large-scale terrorist attack occurs on U.S. soil, another perfect storm combining demands for action, an environment of continuing crisis, acceptance of secrecy, and executive branch officials dedicated to pushing the envelope on war powers may deluge the United States.

Bibliography

Chapter 1

Baker, J. (2007). *In the Common Defense: National Security Law for Perilous Times*. Cambridge: Cambridge University Press

Carter, B., and Trimble, P. (1991) *International Law,* Little, Brown and Company: New York

Dinstein, Y. (2005) *War, Aggression and Self-Defence,* Cambridge University Press: Cambridge

Duffy, H. (2005) *The 'War on Terror' and the Framework of International Law* Cambridge University Press: Cambridge

Franck, T. (2002). *Recourse to Force: State Action Against Threats and Armed Attacks*. Cambridge: Cambridge University Press

Gray, C. (2004) *International Law and the Use of Force,* Oxford University Press: Oxford

Hoffman, B. (2001) Rethinking Terrorism in Light of a War on Terror

Hoffman, B. (1998) *Inside Terrorism* Columbia University Press: New York

Koh, H. (1990) *The National Security Constitution* Yale University Press: New Haven

Reich, W. (1998) Understanding Terrorist Behavior: the limits and opportunities of psychological inquiry. In Reich, W. (ed) *Origins of Terrorism* Woodrow Wilson Center Press: Washington, D.C. pp. 261-279

Sands, P. (2005) *Lawless World* Viking Penguin: New York

Schlesinger, A. (2004) *The Imperial Presidency* Mariner Books: New York

Townshend, C. (2002) *Terrorism: A Very Short Introduction* Oxford University Press: Oxford

Weston, B., Falk, R., and D'Amato, A. (1990) *International Law and World Order,* West Publishing: St. Paul

Chapter 2

Adler, D. and George, L., eds. (1996). *The Constitution and the Conduct of American Foreign Policy*. Kansas: University Press of Kansas

Anderson, S. and Sloan, S. (2009). *Historical Dictionary of Terrorism*. 3rd ed. Lanham, MD: Scarecrow Press, Inc.

Baker, J. (2007). *In the Common Defense: National Security Law for Perilous Times*. Cambridge: Cambridge University Press

Bell, J.B. (2003). *Murders on the Nile: The World Trade Center and Global Terror*. San Francisco: Encounter Books

Benjamin, D., and Simon, S. (2003). *The Age of Sacred Terror: Radical Islam's War Against America*. New York: Random House

Benjamin, D., Crenshaw, M., and Byman, D. (2003) Global Terrorism after the Iraq War. *United States Institute of Peace Special Report*. No. 111, pp. 1-12

Bergen. P. (2002). *Holy War, Inc.: Inside the Secret World of Osama Bin Laden*. New York: Simon & Schuster

Bergen, P. (2006). *The Osama Bin Laden I Know: An Oral History of al Qaeda's Leader*. New York: Simon & Schuster

Bergen, P. (2011). *The Longest War: The Enduring Conflict between America and Al-Qaeda*. New York: Simon & Schuster

Blum, Y. (1987). The Legality of State Response to Acts of Terrorism. In: Netanyahu, B. ed. *Terrorism: How the West Can Win*. New York: Avon Books, pp. 133-138

Brownlie, I. (2003) *Principles of Public International Law*. 6th ed. Oxford: Oxford University Press

Burke, J. (2004). *Al-Qaeda: The True Story of Radical Islam*. London: Penguin Books

Calabresi, S. and Yoo, C. (2008). *The Unitary Executive: Presidential Power from Washington to Bush*. New Haven: Yale University Press

Carter, B., and Trimble, P. (1991) *International Law.* New York: Little, Brown and Company

Clarke, R. (2004). *Against All Enemies: Inside America's War on Terror*. New York: Simon & Schuster

Clarke, R. (2004a) Honorable Commission, Toothless Report. *New York Times*. Opinion, July 25, 2004

Coll, S. (2004). *Ghost Wars: The Secret History of the CIA, Afghanistan, and Bin Laden, From the Soviet Invasion to September 10, 2001*. New York: Penguin Books

Crenshaw, M., ed. (1995). *Terrorism in Context*. University Park, Pa.: Pennsylvania State University Press

Daalder, I., and Destler, I. (2009). In the Shadow of the Oval Office: The Next National Security Adviser. *Foreign Affairs*. Vol. 88, no. 1, January/February pp. 114-129

Dinstein, Y. (2005) *War, Aggression and Self-Defence.* Cambridge: Cambridge University Press

Donohue, L. (2008). *The Costs of Counterterrorism: Power, Politics, and Liberty*. Cambridge: Cambridge University Press

Duffy, H. (2005) *The 'War on Terror' and the Framework of International Law.* Cambridge: Cambridge University Press

Dycus, S., Berney, A., Banks, W., and Raven-Hansen, P. (2002) *National Security Law*. 3rd ed. New York: Aspen Publishers

Ely, J. H. (1993). *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*. Princeton, NJ: Princeton University Press

Fein, B. (2010). *American Empire Before the Fall*. Lexington, Kentucky: Campaign for Liberty

Fijnaut, C., Wouters, J. and Naert, F., eds. (2004). *Legal Instruments in the Fight against International Terrorism*. Leiden: Martinus Nijhoff Publishers

Fisher, L. (2004). *Presidential War Power*. 2nd ed. Kansas: University Press of Kansas

Fisher, L. (2006). *In the Name of National Security: Unchecked Power and the Reynolds Case*. Kansas: University Press of Kansas

Fisher, L. (2007). *Constitutional Conflicts Between Congress and the President*. 5th ed. Kansas: University Press of Kansas

Fisher, L. (2008). *The Constitution and 9/11: Recurring Threats to America's Freedoms*. Kansas: University Press of Kansas

Franck, T. (2002). *Recourse to Force: State Action Against Threats and Armed Attacks*. Cambridge: Cambridge University Press

Franck, T. and Weisband, E. (1979). *Foreign Policy by Congress*. Oxford: Oxford University Press

Fromkin, D. (1975) The Strategy of Terrorism. *Foreign Affairs*. July, pp. 9-26

Gardam, J. (2004). *Necessity, Proportionality and the Use of Force by States*. Cambridge: Cambridge University Press

Gray, C. (2004) *International Law and the Use of Force,* Oxford: Oxford University Press

Grimmett, R. (2012). *War Powers Resolution: Presidential Compliance*. Washington, DC: Congressional Research Service

Hoffman, B. (1998). *Inside Terrorism*. New York: Columbia University Press

Jenkins, B. (2008). *Will Terrorists Go Nuclear?* New York: Prometheus Books

Koh, H. (1990). *The National Security Constitution: Power Sharing After the Iran-Contra Affair*. New Haven: Yale University Press

Laqueur, W. (1977). *Terrorism: A Study of National and International Political Violence*. Boston: Little, Brown and Company

Laqueur, W. (2003) *No End to War: Terrorism in the 21st Century*. New York: Continuum Publishing Group

Lawrence, B., ed. (2005). *Messages to the World: The Statements of Osama Bin Laden*. New York: Verso Publishing

Mayer, J. (2009). *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals*. New York: Anchor Books

Maogoto, J. (2005). *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror*. Aldershot: Ashgate Publishing

Murden, S. (2009). *The Problem of Force: Grappling with the Global Battlefield*. Boulder, Colorado: Lynne Rienner Publishers

Mylroie, L. (2001). *Study of Revenge: Saddam Hussein's Unfinished War Against America*. Washington, DC: American Enterprise Institute Press

Mylroie, L. and Miller, J. (1990) *Saddam Hussein and the Crisis in the Gulf*. New York: Ballantine Books

National Commission on Terrorist Attacks upon the United States (2004). *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States.* New York: Norton

National Commission on Terrorist Attacks upon the United States (2004) *The 9/11 Investigations: Staff Reports of the 9/11 Commission*. New York: Public Affairs Books

Netanyahu, B. (1987). Terrorism: How the West Can Win. In: Netanyahu, B. ed. *Terrorism: How the West Can Win*. New York: Avon Books, pp. 199-226

Pape, R. (2005). *Dying to Win: The Strategic Logic of Suicide Terrorism*. New York: Random House

Pfiffner, J. and Phythian, M. eds. (2008). *Intelligence and National Security Policymaking on Iraq: British and American Perspectives*. College Station: Texas A&M University Press

Reich, W. (1998). Understanding Terrorist Behavior: The Limits and Opportunities of Psychological Inquiry. In: Reich, W., ed. *Origins of Terrorism*. Washington, DC: Woodrow Wilson Center Press

Record, J. (2003). Bounding the Global War on Terrorism. *Parameters*. December 2003, pp. 1-56

Richardson, L. (2006). *What Terrorists Want: Understanding the Enemy, Containing the Threat*. New York: Random House

Riedel, B. (2008). *The Search for Al Qaeda: Its Leadership, Ideology, and Future*. Washington, DC: Brookings Institution Press

Ritchie, N. and Rogers, P. (2007). *The Political Road to War with Iraq: Bush, 9/11 and the Drive to Overthrow Saddam*. New York: Routledge

Sapiro, M. (2003) Iraq: The Shifting Sands of Preemptive Self-Defense. *American Journal of International Law*. Vol. 97, No. 3, July. pp. 599-606

Savage, C. (2007). *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy*. New York: Little, Brown and Company

Schlesinger, A. (2004) *The Imperial Presidency*. New York: Mariner Books
Schmid, A. (1988) *Political Terrorism*. Amsterdam: North-Holland Publishing Co.

Schmid, A. (2005). Terrorism as Psychological Warfare. *Democracy and Security*. Vol. 1, 2005, pp.137-146

Schwarz, F. and Huq, A. (2007). *Unchecked and Unbalanced: Presidential Power in a Time of Terror*. New York: New Press

Smith, S. (2002). Unanswered Questions. In: Booth, K. and Dunne, T. eds. *Worlds in Collision*. Hampshire: Palgrave Macmillan, pp. 48-59

Sofaer, A. (1986). Terrorism and the Law. *Foreign Affairs*. Vol. 64, pp. 901-922

Sofaer, A. (1989). Terrorism, the Law, and the National Defense. *Military Law Review*. Vol. 126, pp. 89-123

Sofaer, A. (2010a). The Best Defense? Preventive Force and International Law. *Foreign Affairs*. Vol. 89, No. 1, pp. 109-133

Sofaer, A. (2010) *The Best Defense? Legitimacy & Preventive Force*. Stanford, California: Hoover Institution Press

Stahn, C. (2002) Collective Security and Self-Defense after the September 11 Attacks. *Tilburg Foreign Law Review*. Vol. 10, No. 1, pp.10-42

Sterling, C. (1981). *The Terror Network*. New York: Berkley Books

Taft, W. and Buchwald, T. (2003) Preemption, Iraq, and International Law. *American Journal of International Law*. Vol. 97, No. 3, July. pp. 557-562

Thompson, P. (2004). *The Terror Timeline*. New York: Harper

Van Krieken, P. ed. (2002) *Terrorism and the International Legal Order*. The Hague: Asser Press

Weston, B., Falk, R., and D'Amato, A. (1990) *International Law and World Order,* West Publishing St. Paul

Wilkinson, P. (1986). *Terrorism and the Liberal State*. 2nd ed. New York: New York University Press

Wilkinson, P. (2006). *Terrorism versus Democracy: The Liberal State Response*. 2nd ed. New York: Routledge

Wright, L. (2006). *The Looming Tower: Al-Qaeda and the Road to 9/11*. New York: Random House

Chapter 3

Baker, J. (2007). *In the Common Defense: National Security Law for Perilous Times*. Cambridge: Cambridge University Press

Binder, S., Mann, T., Ornstein, N., and Reynolds, M. (2009). *Mending the Broken Branch: Assessing the 110th Congress, Anticipating the 111th*. Washington, DC: Brookings Institution Press

Coll, S. (2004). *Ghost Wars: The Secret History of the CIA, Afghanistan, and Bin Laden, From the Soviet Invasion to September 10, 2001*. New York: Penguin Books

Daalder, I., and Destler, I. (2009). In the Shadow of the Oval Office: The Next National Security Adviser. *Foreign Affairs*. Vol. 88, no. 1, January/February pp. 114-129

Donohue, L. (2008). *The Costs of Counterterrorism: Power, Politics, and Liberty*. Cambridge: Cambridge University Press

Donohue, L. (February 7, 2012). Interview with author.

Ely, J. H. (1993). *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*. Princeton, NJ: Princeton University Press

Fein, B. (2010). *American Empire Before the Fall*. Lexington, Kentucky: Campaign for Liberty

Fein, B. (September 10, 2010). Interview with author.

Fisher, L. (2004). *Presidential War Power*. Kansas: University Press of Kansas

Fisher, L. (2008). *The Constitution and 9/11: Recurring Threats to America's Freedoms*. Kansas: University Press of Kansas

Fisher, L. (September 22, 2010). Interview with author.

Gellman, B. (2002). A Strategy's Cautious Evolution. *Washington Post*. January 20, 2002, A1

Grimmett, R. (2012). *War Powers Resolution: Presidential Compliance*. Washington, DC: Congressional Research Service

Green, J. (2007). The Rove Presidency. *The Atlantic*. September pp. 49-62

Huq, A. (2007) Imperial March. *Democracy Journal*. Winter 2007. Available at: www.democracyjournal.org (Accessed March 2011)

Koh, H. (1990). *The National Security Constitution: Power Sharing After the Iran-Contra Affair*. New Haven: Yale University Press

Marshall, W. (2008). Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters. *Boston University Law Review*. Vol. 88, pp. 505-522

Mayer, J. (2009). *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals*. New York: Anchor Books

O'Connell, M. (2010). Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009. *Notre Dame Law School, Legal Studies Research Paper* No. 09-43. Online at http://ssrn.com/abstract=1501144

Priest, D. and Arkin, W. (2011) *Top Secret America: The Rise of the New American Security State*. New York: Little, Brown and Company

Savage, C. (2007). *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy*. New York: Little, Brown and Company

Savage, C. (2011). *Power Wars: Unmasking National Security Legal Policy Deliberations under Bush and Obama*. Kindle Single eBook

Schwarz, F. and Huq, A. (2007). *Unchecked and Unbalanced: Presidential Power in a Time of Terror*. New York: New Press

Wills, G. (2010). *Bomb Power: The Modern Presidency and the National Security State*. London: Penguin Books

U.S. Supreme Court Cases

Curtiss-Wright Export Corp. v. United States, 229 U.S. 304 (1936)

Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952)

U.S. Laws

National Security Act of 1947, Pubic Law 80-235, 61 Stat. 495

War Powers Resolution of 1973, 50 U.S.C. 1541-1548

Chapter 4

Carter, B., and Trimble, P. (1991). *International Law,* New York: Little, Brown and Company

Coll, S. (2004). *Ghost Wars: The Secret History of the CIA, Afghanistan, and Bin Laden, from the Soviet Invasion to September 10, 2001.* New York: Penguin Books

Combating Terrorism: The Official Report of the Cabinet-level Task Force Chaired by Vice President George Bush, (1987) DIANE Publishing Company: Rancocas, New Jersey

Dinstein, Y. (2005). *War, Aggression and Self-Defence,* Cambridge: Cambridge University Press

Duffy, H. (2005). *The 'War on Terror' and the Framework of International Law* Cambridge: Cambridge University Press

Evans, G., and Newham, J. (1998). *The Penguin Dictionary of International Relations.* London: Penguin Books:

Fein, B. (September 10, 2010). Interview with author.

Fisher, L. (2004) *Presidential War Power.* Lawrence, Kansas: University Press of Kansas

Fisher, L. (September 22, 2010). Interview with author.

Gray, C. (2004). *International Law and the Use of Force.* Oxford: Oxford University Press

Henninger, D. (2006). George Shultz, Father of the Bush Doctrine. *Wall Street Journal.* April 29, 2006

House Select Committee to Investigate Covert Arms Transactions with Iran and Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition, *Report of the Congressional Committees Investigating the Iran-Contra Affair*, 100th Congress, (1987)

Hoffman, B. (2001). Rethinking Terrorism in Light of a War on Terror

Hoffman, B. (1998). *Inside Terrorism.* New York*:* Columbia University Press

Intoccia, G. (1987). "American Bombing of Libya: An International Legal Analysis," *Case Western Reserve Journal of International Law* 19:177-213

Jackson, R. (2005). *Writing the War on Terror.* Manchester: Manchester University Press

Maogoto, J. (2005) *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror,* Ashgate Publishing: Aldershot

Martin, D., and Walcott, J. (1988) *Best Laid Plans: the Inside Story of America's War Against Terrorism.* New York: Simon & Shuster:

McCredie, J. (1987) "The April 14, 1986 Bombing of Libya: Act of Self-Defense or Reprisal?" *Case Western Reserve Journal of International Law* 19:215-242

Murphy, J. (1986) "The Future of Multilateralism and Efforts to Combat International Terrorism," *Columbia Journal of Transnational Law* 25:35-99

O'Connell, M. (2010). Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009. *Notre Dame Law School, Legal Studies Research Paper* No. 09-43. Online at http://ssrn.com/abstract=1501144

Paust, J. (1986) "Responding Lawfully to International Terrorism: the Use of Force Abroad," *Whittier Law Review* 8:711-733

Persico, J. (1990). *Casey: From the OSS to the CIA.* New York: Viking Penguin

Powell, C. (1995). *My American Journey*. New York: Random House

Reagan, R. and Brinkley, D. ed. (2007). *The Reagan Diaries.* New York: HarperCollins Publishers

Reich, W. (1998) Understanding Terrorist Behavior: the limits and opportunities of psychological inquiry. In Reich, W. (ed) *Origins of Terrorism* Woodrow Wilson Center Press: Washington, D.C. pp. 261-279

Report of the Department of Defense Commission on Beirut International Airport Terrorist Act, October 23, 1983 (Long Commission), December 20, 1983

Savage, C. (2007). *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy.* New York: Little, Brown, and Company

Shultz, G. (1993). *Turmoil and Triumph: My Years as Secretary of State.* New York: Macmillan Publishing

Schwartz, J. (2007) Dealing with a "Rogue State:" The Libya Precedent, *American Journal of International Law*. 101: 553-580

Sofaer, A. (1986). Terrorism and the Law. *Foreign Affairs*. Vol. 64, pp. 901-922

Sofaer, A. (1989). Terrorism, The Law, and the National Defense, *Military Law Review* 126:89-123

Townshend, C. (2002). *Terrorism: A Very Short Introduction.* Oxford: Oxford University Press

"War Powers, Libya, and State-Sponsored Terrorism," hearings before the House Committee on Foreign Affairs, 99th Congress (1986)

Weinberger, C. (2001). *In the Arena: A Memoir of the 20th Century.* Washington, DC: Regnery Publishing Inc.

Weiner, T. (2007). *Legacy of Ashes: the History of the CIA*. New York: Random House

Wills, D. (2003). *The First War on Terrorism: Counter-terrorism Policy during the Reagan Administration.* Lanham, Maryland: Rowman & Littlefield Publishers

Winkler, C. (2006). *In the Name of Terrorism: Presidents on Political Violence in the Post-World War II Era.* Albany, New York: State University of New York Press

Woodward, B. (1987). *Veil: The Secret Wars of the CIA*. New York: Simon and Shuster

Chapter 5

Ambrose, S. and Brinkley, D. (1997). *Rise to Globalism: American Foreign Policy since 1938*, New York: Penguin Books

Bush, G. (1993). Address at West Point, January 5, 1993, online at www.millercenter.org/president/speeches/detail/3433

Bush, G. and Scowcroft, B. (1998). *A World Transformed*, New York: Knopf

Brzezinski, Z. (2007). *Second Chance: Three Presidents and the Crisis of the American Superpower*, New York: Basic Books

Carter, B., and Trimble, P. (1991). *International Law*, New York: Little, Brown and Company

Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits), ICJ Reports 392, June 27, 1986

Coll, S. (2004). *Ghost Wars: The Secret History of the CIA, Afghanistan, and Bin Laden, from the Soviet Invasion to September 10, 2001*, New York: Penguin Books

Combating Terrorism: The Official Report of the Cabinet-level Task Force Chaired by Vice President George Bush, (1987) Rancocas, New Jersey: DIANE Publishing Company

Dinstein, Y. (2005). *War, Aggression and Self-Defence*, Cambridge: Cambridge University Press

Duffy, H. (2005). *The 'War on Terror' and the Framework of International Law,* Cambridge: Cambridge University Press

Fisher, L. (2007). *Constitutional Conflicts between Congress and the President,* Kansas: University Press of Kansas

Fisher, L. (2004). *Presidential War Power*, Kansas: University Press of Kansas

Gerson, A. and Adler, J. (2001). *The Price of Terror: Lessons of Lockerbie for a World on the Brink*, New York: Harper Collins

Gray, C. (2004). *International Law and the Use of Force*, Oxford: Oxford University Press

Hoffman, B. (2001). Rethinking Terrorism in Light of a War on Terror

Hoffman, B. (1998). *Inside Terrorism*, New York: Columbia University Press

Jackson, R. (2005). *Writing the War on Terror*, Manchester: Manchester University Press

Maogoto, J. (2005). *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror*, Aldershot: Ashgate Publishing

Martin, D., and Walcott, J. (1988). *Best Laid Plans: the inside Story of America's War against Terrorism*, New York: Simon & Shuster

McCormick, J. (2005). *American Foreign Policy and Process.* California: Thomson Wadsworth

Murphy, J. (1986). The Future of Multilateralism and Efforts to Combat International Terrorism. *Columbia Journal of Transnational Law* 25:35-99

Paust, J. (1986). Responding Lawfully to International Terrorism: the Use of Force Abroad. *Whittier Law Review* 8:711-733
President's Commission on Aviation Security and Terrorism (1990), Established by Executive Order 12686 of August 4, 1989

Reich, W. (1998). Understanding Terrorist Behavior: the Limits and Opportunities of Psychological Inquiry. In Reich, W. (ed) *Origins of Terrorism*, Washington, D.C: Woodrow Wilson Center Press, pp. 261-279

Schlesinger, A. (2004). *The Imperial Presidency*, New York: Mariner Books

Schwartz, J. (2007). Dealing with a “Rogue State:” The Libya Precedent, *American Journal of International Law.* 101: 553-580

Sofaer, A. (1986). Terrorism and the Law. *Foreign Affairs*. Vol. 64, pp. 901-922

Sofaer, A. (1989). Terrorism, the Law, and the National Defense, *Military Law Review.* 126:89-123

Townshend, C. (2002). *Terrorism: A Very Short Introduction* Oxford: Oxford University Press

Tucker, D. (1997). *Skirmishes at the Edge of Empire: the United States and International Terrorism,* Westport, Connecticut: Praeger

Wilkinson, P. (1986). *Terrorism and the Liberal State,* New York: New York University Press

Wills, D. (2003). *The First War on Terrorism: Counter-terrorism Policy during the Reagan Administration*, Lanham, Maryland: Rowman & Littlefield Publishers

Winkler, C. (2006). *In the Name of Terrorism: Presidents on Political Violence in the Post-World War II Era,* Albany, New York: State University of New York Press

Chapter 6

Adler, D. (2002). Clinton, the Constitution, and the War Power. In: Adler, D. and Genovese, M. eds. *The Presidency and the Law: the Clinton Legacy*. Kansas: University of Kansas Press, pp. 19-57.

Albright, M. (2003). *Madam Secretary.* New York: Miramax Books

Baker, J. (2007). *In the Common Defense: National Security Law for Perilous Times*. Cambridge: Cambridge University Press

Benjamin, D. and Simon, S. (2003). *The Age of Sacred Terror: Radical Islam’s War Against America.* New York: Random House

Bergen, P. (July 23, 2010). Interview with author.

Clarke, R. (2004). *Against All Enemies: Inside America’s War on Terror.* New York: Free Press

Clinton, B. (2005). *My Life: Volume II, The Presidential Years.* New York: Vintage Books

Feste, K. (2011). *America Responds to Terrorism: Conflict Resolution Strategies of Clinton, Bush, and Obama.* New York: Palgrave Macmillan

Fisher, L. (2004). *Presidential War Power.* Kansas: University Press of Kansas

Fisher, L. (2008). *The Constitution and 9/11: Recurring Threats to American's Freedoms.* Kansas: University Press of Kansas

Freeh, L. (2005). *My FBI: Bringing down the MAFIA, Investigating Bill Clinton, and Fighting the War on Terror.* New York: St. Martin's Press

Grimmett, R. (2007). *CRS Report for Congress: The War Powers Resolution after Thirty-three Years.* Washington, DC: Congressional Research Service

Hendrickson, R. (2002). *The Clinton Wars: the Constitution, Congress, and War Powers.* Nashville: Vanderbilt University Press

Koh, H. (1990). *The National Security Constitution: Power Sharing After the Iran-Contra Affair.* New Haven: Yale University Press

Maogoto, J. (2005). *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror*. Aldershot: Ashgate Publishing

McCormick, J. (2005). *American Foreign Policy and Process*. California: Thomson Wadsworth:

National Commission on Terrorist Attacks upon the United States (2004). *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States.* New York: Norton

Pillar, P. and Preble, C. (2010). Don't You Know There's a War On? Assessing the Military's Role in Counterterrorism. In: Friedman, B., Harper, J., and Preble, C. eds. *Terrorizing Ourselves: Why U.S. Counterterrorism Policy is Failing and How to Fix It.* Washington, DC: Cato Institute, pp. 61-81.

Ratner, M. and Lobel, J. (1993). "Bombing Baghdad: Illegal Reprisal or Self-Defense?" *Legal Times*, July 5, 1993

Schlesinger, A. (2004). *The Imperial Presidency.* New York: Mariner Books

Thompson, P. (2004). *The Terror Timeline: A Comprehensive Chronicle of the Road to 9/11 and America's Response.* New York: HarperCollins Publishers

Tucker, D. (1997). *Skirmishes at the Edge of Empire: the United States and International Terrorism.* Westport, Connecticut: Praeger

Winkler, C. (2006). *In the Name of Terrorism: Presidents on Political Violence in the Post-World War II Era.* Albany, New York: State University of New York

Legal Documents

War Powers Resolution of 1973, 50 U.S.C. 1541-1548

Chapter 7

Alston, P. (2010). *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*. United Nations General Assembly Human Rights Council, May 28, 2010

Anderson, K. (2010). Predators over Pakistan: The U.S. drone campaign is effective---and legal. Why won't the Obama administration's lawyers defend it? *The Weekly Standard*. March 8, 2010

Bacevich, A. (2004). *The New American Militarism: How Americans are Seduced by War*. Oxford: Oxford University Press

Baker, J. (2007). *In the Common Defense: National Security Law for Perilous Times*. Cambridge: Cambridge University Press

Bergen, P. (2011). *The Longest War: The Enduring Conflict between America and Al-Qaeda*. New York: Simon & Schuster

Bergen, P. (July 23, 2010). Interview with author.

Blum, G. and Heymann, P. (2010). Law and Policy of Targeted Killing. *Harvard National Security Journal*. Vol. 1, June 27, 2010, pp.145-170

Bush, G. (2010). *Decision Points*. New York: Crown Publishers

Bush, G. (2002). Commencement Address at the United States Military Academy in West Point, New York, June 1, 2002. *Weekly Compilation of Presidential Documents, Administration of George W. Bush.*

Bush, G. (2002a). State of the Union Address before a Joint Session of Congress, January 29, 2002, as cited in Sifry, M. and Cerf, M. eds. (2003). *The Iraq War Reader: History, Documents, and Opinions.* New York: Simon & Schuster

Bush, G. (2003). State of the Union Address before a Joint Session of Congress, January 28, 2003, Online at www.washingtonpost.com

Byman, D. (2009). Do Targeted Killings Work? *Brookings Institution Briefings*

Byrd, R. (2002). Remarks on the Senate Floor, October 4, 2002, as cited in Sifry, M. and Cerf, M. eds. (2003). *The Iraq War Reader: History, Documents, and Opinions.* New York: Simon & Schuster

Chandrasekaran, R. (2006). *Imperial Life in the Emerald City*. New York: Alfred A. Knopf

Cheney, R. (2002). Address to the National Convention of Veterans of Foreign Wars, August 26, 2002 as cited in Sifry, M. and Cerf, M. eds. (2003). *The Iraq War Reader: History, Documents, and Opinions.* New York: Simon & Schuster

Cheney, R. (2011). *In My Time: A Personal and Political Memoir*. New York: Simon & Schuster

Cole, D., ed. (2009). *The Torture Memos: Rationalizing the Unthinkable*. New York: The New Press

Coll, S. (2004). *Ghost Wars: The Secret History of the CIA, Afghanistan, and Bin Laden, From the Soviet Invasion to September 10, 2001*. New York: Penguin Books

Daalder, I. and Lindsay, J. (2005). *America Unbound: The Bush Revolution in Foreign Policy*. Hoboken, NJ: John Wily and Sons, Inc.

Daggett, S. (2006). *Military Operations: Precedents for Funding Contingency Operations in Regular or in Supplemental Appropriations Bills*. Washington, DC: Congressional Research Service Report for Congress

Daschle, T. (2005). Power We Didn't Grant. *Washington Post*. December 23, 2005

Donohue, L. (2008). *The Costs of Counterterrorism: Power, Politics, and Liberty*. Cambridge: Cambridge University Press

Donohue, L. (February 7, 2012). Interview with author.

Drew, E. (2006). Power Grab. *New York Review of Books*. June 26, 2006, Vol. 53, No. 11

Fein, B. (2010). *American Empire Before the Fall*. Lexington, Kentucky: Campaign for Liberty

Fein, B. (September 10, 2010). Interview with author.

Fisher, L. (2004). *Presidential War Power*. 2nd ed. Kansas: University Press of Kansas

Fisher, L. (2007). Signing Statements: Constitutional and Practical Limits. *William and Mary Bill of Rights Journal.* Vol. 16, pp. 183-210

Fisher, L. (2008). *The Constitution and 9/11: Recurring Threats to America's Freedoms*. Kansas: University Press of Kansas

Fisher, L. (September 22, 2010). Interview with author.

Garvey, T. (2012). *Presidential Signing Statements: Constitutional and Institutional Implications.* Washington, DC: Congressional Research Service Report for Congress

Gause, F. G. (2005). Can Democracy Stop Terrorism? *Foreign Affairs*. Vol. 84, No. 5, pp. 62-78

Gellman, B. (2002). A Strategy's Cautious Evolution. *Washington Post*. January 20, 2002, A1

Gellman, B. (2008). *Angler: The Cheney Vice Presidency*. New York: The Penguin Press

Goldstein, J. (2009). *Cheney, Vice Presidential Power and the War on Terror*. Online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1450601

Greenberg, K. and Dratel, J., eds. (2005). *The Torture Papers: The Road to Abu Ghraib* Cambridge: Cambridge University Press

Greenberg, K. ed. (2006). *The Torture Debate in America*. Cambridge: Cambridge University Press

Grey, S. (2006). *Ghost Plane: The True Story of the CIA Torture Program*. New York: St. Martin's Press

Halper, S. and Clarke, J. (2004). *America Alone: The Neo-conservatives and the Global Order*. Cambridge: Cambridge University Press
Heisbourg, F. (2003). A Work in Progress: The Bush Doctrine and Its Consequences. *The Washington Quarterly*. Vol. 26, pp. 75-88

Herszenhorn, D. (2008). Estimates of Iraq War Cost Were Not Close to Ballpark. *New York Times*. March 19, 2008

Heyns, C. (2012). *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*. United Nations General Assembly Human Rights Council, March 30, 2012

Horton, S. (2010). The Law of Armed Conflict: Six Questions for Gary Solis. *Harper's Magazine*. Online at www.harpers.org/archive/2010/04/hbc-90006912.

Keen, J. (2004) Cheney Says It's Too Soon To Tell on Iraqi Arms. *USA Today*. January 19, 2004

Kelley, C. (2008). The Unitary, or Unilateral Executive? Presidential Power in the Bush Administration. *American Review of Politics*. Fall/Winter. 2008-2009.

Kilcullen, D. and Exum, A. (2009). Death From Above, Outrage Down Below. *New York Times.* May 17, 2009

Kilcullen, D. (2005). Countering Global Insurgency. *Journal of Strategic Studies*. Vol. 28, Issue 4

Koh, H. (1990). *The National Security Constitution: Power Sharing After the Iran-Contra Affair*. New Haven: Yale University Press

Koh, H. (2010). The Obama Administration and International Law. Speech to the Annual Meeting of the American Society of International Law, Washington, DC, March 25, 2010.

Online at www.state.gov/s/l/release/remarks/139119.htm.

Korb, L. and Wadhams, C. (2006). A Critique of the Bush Administration's National Security Strategy. *The Stanley Foundation Policy Analysis Brief*, June 2006. Online at www.reports.stanleyfoundation.org

Lashmar, P. and Whitaker, R. (2003). M16 and CIA: The New Enemy Within, as cited in Sifry, M. and Cerf, M. eds. (2003). *The Iraq War Reader: History, Documents, and Opinions.* New York: Simon & Schuster

Maddow, R. (2012). *Drift: The Unmooring of American Military Power*. New York: Crown Publishers

Mayer, J. (2009). *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals*. New York: Anchor Books

Mayer, J. (2006). The Hidden Power. *The New Yorker*. July 3, 2006

Mayer, J. (2009a). The Predator War. *The New Yorker*. October 26, 2009

McCormick, J. (2004). The Foreign Policy of the George W. Bush Administration. In: Schier, S. ed. *High Risk and Big Ambition: The Presidency of George W. Bush*. Pittsburgh: University of Pittsburgh Press

Murden, S. (2009). *The Problem of Force: Grappling with the Global Battlefield*. Boulder, Colorado: Lynne Rienner Publishers, Inc.

Mylroie, L. (2001). The Iraqi Connection. *Wall Street Journal*. September 13, 2001

The National Security Strategy of the United States of America, The White House, September 2002

O'Connell, M. (2010). Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009. *Notre Dame Law School, Legal Studies Research Paper* No. 09-43. Online at http://ssrn.com/abstract=1501144

O'Hanlon, M., Rice, S., and Steinberg, J. (2002). The New National Security Strategy and Preemption. *The Brookings Institution Policy Brief*. Washington, DC: The Brookings Institution, Policy Brief #113, December 2002

Paust, J. (2009). Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan. *Journal of Transnational Law and Policy*. Online at http://ssrn.com/abstract=1520717

Phythian, M. (2006). The Perfect Intelligence Failure? U.S. Pre-War Intelligence on Iraqi Weapons of Mass Destruction. *Politics & Policy*, Vol. 34, No. 2

Phythian, M. (2011). The Problem of Intelligence Ethics. In: Bergman-Rosamond, A. and Phythian, M. eds. *War, Ethics, and Justice: New Perspectives on a Post-9/11 World*. New York: Routledge, pp. 128-149

Pillar, P. (2001). *Terrorism and U.S. Foreign Policy*. Washington, DC: Brookings Institution Press

Pillar, P. (August 26, 2010). Interview with author.

Pillar, P. (2006). Intelligence, Policy, and the War in Iraq: A Dysfunctional Relationship. *Foreign Affairs*. March/April 2006

Powell, C. (2003). Presentation to the U.N. Security Council: A Threat to International Peace and Security, February 5, 2003 as cited in Sifry, M. and Cerf, M. eds. (2003). *The Iraq War Reader: History, Documents, and Opinions.* New York: Simon & Schuster

President's Statement on H.R. 3199, the USA Patriot Improvement and Reauthorization Act of 2005, March 9, 2006.
Online at www.whitehouse.gov/news/releases/2006/03/20060309-8.html.

Priest, D. (2004). Memo Lets CIA Take Detainees Out of Iraq. *Washington Post*. October 24, 2004, p. 1

Rice, C. (2000). Campaign 2000: Promoting the National Interest. *Foreign Affairs*. July/August 2000

Rice, C. (2011). *No Higher Honor: A Memoir of My Years in Washington*. New York: Crown Publishers

Ricks, T. (2006). *Fiasco: The American Military Adventure in Iraq*. New York: Penguin Press

Ritchie, N. and Rogers, P. (2007). *The Political Road to War with Iraq: Bush, 9/11 and the Drive to Overthrow Saddam*. New York: Routledge

Rogers, P. (2004). *A War on Terror: Afghanistan and After*. London: Pluto Press

Rogers, P. (2008). *Global Security and the War on Terror: Elite Power and the Illusion of Control*. New York: Routledge

Rumsfeld, D. (2011). *Known and Unknown: A Memoir*. New York: Sentinel Books

Sanger, D. (2009). *The Inheritance: the World Obama Confronts and the Challenges to American Power.* New York: Harmony Books

Savage, C. (2007). *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy*. New York: Little, Brown and Company

Savage, C. (2012). Shift on Executive Power Lets Obama Bypass Rivals. *New York Times*. April 22, 2012

Schlesinger, A. (2004) *The Imperial Presidency*. New York: Mariner Books

Schmitt, E. and Shanker, T. (2008). Officials Say U.S. Killed an Iraqi in Raid in Syria. *New York Times*, October 28, 2008, p. 1

Solis, G. (2010). America's Unlawful Combatants. *Washington Post*, March 12, 2010

Stockholm International Peace Institute, Military Expenditure Database, www.sipri.org/databases/milex

Tenet, G. (2002). Letter to Senator Bob Graham, October 7, 2002, as cited in Sifry, M. and Cerf, M. eds. (2003). *The Iraq War Reader: History, Documents, and Opinions.* New York: Simon & Schuster

Toope, S. (2005) *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar: Final Report*. Arar Commission of the Government of Canada. October 14, 2005.
www.aracommission.ca/eng/ToopeReport_final.pdf

Wilkerson, L. (March 3, 2011) Interview with author.

Witte, G. and Khan, K. (2006). Attacks Strain Efforts on Terror. *Washington Post*, January 23, 2006, p.1

Wright, R. and Warrick, J. (2008). U.S. Steps Up Unilateral Strikes in Pakistan. *Washington Post*, March 27, 2008, p. 1

Yoo, J. (2006). *The Powers of War and Peace: the Constitution and Foreign Affairs after 9/11*. Chicago: University of Chicago Press

Zenko, M. (2010). *Between Threats and War: U.S. Discrete Military Operations in the Post-Cold War World*. Stanford, California: Stanford University Press

Chapter 8

Ackerman, B. (2009). Why We Need a Commission on Presidential Power. *The American Prospect*, March 26, 2009

Ackerman, B. (2010). *The Decline and Fall of the American Republic*. Boston: Belknap Press of Harvard University Press

Bacevich, A. (2005). *The New American Militarism: How Americans are Seduced by War*. Oxford: Oxford University Press

Bergen, P. (2011). *The Longest War: The Enduring Conflict between America and Al-Qaeda*. New York: Simon & Schuster

Bergen, P. (July 23, 2010). Interview with author.

Bowcott, O. (2011). Osama bin Laden: U.S. Responds to Questions about Killing's Legality. May 3, 2011, *The Guardian*, online at www.guardian.co.uk

Burke, J. (2004). *Al-Qaeda: The True Story of Radical Islam*. London: Penguin Books

Bush, G. (2010). *Decision Points*. New York: Crown Publishers

Byman, D. (2009). Do Targeted Killings Work? *Brookings Institution Briefings*

Case concerning Military and Paramilitary Activities in and against Nicaragua, 1986 ICJ Reports14

Cheney, R. (2011). *In My Time: A Personal and Political Memoir*. New York: Simon & Schuster

Cole, D., ed. (2009). *The Torture Memos: Rationalizing the Unthinkable*. (New York: The New Press)

Coll, S. (2004). *Ghost Wars: The Secret History of the CIA, Afghanistan, and Bin Laden, From the Soviet Invasion to September 10, 2001*. New York: Penguin Books

Dinstein, Y. (2005) *War, Aggression and Self-Defence.* Cambridge: Cambridge University Press

Donohue, L. (2008). *The Costs of Counterterrorism: Power, Politics, and Liberty*. Cambridge: Cambridge University Press

Donohue, L. (2010). The Shadow of State Secrets. *University of Pennsylvania Law Review*. Vol. 159

Donohue, L. (February 7, 2012). Interview with author.

Fein, B. (2008). *Constitutional Peril: The Life and Death Struggle for Our Constitution and Democracy*. New York: Palgrave Macmillan

Fein, B. (September 10, 2010). Interview with author.

Fisher, L. (2004). *Presidential War Power*. 2nd ed. Kansas: University Press of Kansas

Fisher, L. (2008). *The Constitution and 9/11: Recurring Threats to America's Freedoms*. Kansas: University Press of Kansas

Fisher, L. (September 22, 2010). Interview with author.

Garraway, C. (2006). The 'War on Terror': Do the Rules Need Changing? *Chatham House Briefing Paper*, September 2006

Gause, F. G. (2005). Can Democracy Stop Terrorism? *Foreign Affairs*. Vol. 84, No. 5, pp. 62-78

Gellman, B. (2008). *Angler: The Cheney Vice Presidency*. New York: The Penguin Press

Gray, C. (2004) *International Law and the Use of Force,* Oxford: Oxford University Press

Greenberg, K. and Dratel, J., eds. (2005). *The Torture Papers: The Road to Abu Ghraib* Cambridge: Cambridge University Press

Grey, S. (2006). *Ghost Plane: The True Story of the CIA Torture Program*. New York: St. Martin's Press

Heisbourg, F. (2003). A Work in Progress: The Bush Doctrine and Its Consequences. *The Washington Quarterly*. Vol. 26, pp. 75-88

Horton, S. (2010). The Law of Armed Conflict: Six Questions for Gary Solis. *Harper's Magazine*. Online at www.harpers.org/archive/2010/04/hbc-90006912

Interviewee A, former CIA Analyst. (September 13, 2011). Interview with author.

Jones, S. and Libicki, M. (2008). How Terrorist Groups End: Lessons for Countering al Qa'ida. Online at www.RAND.org

Kelley, C. (2008). The Unitary, or Unilateral Executive? Presidential Power in the Bush Administration. *American Review of Politics*. Fall/Winter. 2008-2009.

Kirgis, F. (2001). Israel's Intensified Military Campaign Against Terrorism. *American Society of International Law Insights*, December 10, 2001

Koh, H. (1990). *The National Security Constitution: Power Sharing After the Iran-Contra Affair*. New Haven: Yale University Press

Koh, H. (2010). The Obama Administration and International Law. Speech to the Annual Meeting of the American Society of International Law, Washington, DC, March 25, 2010.
Online at www.state.gov/s/l/release/remarks/139119.htm

Maogoto, J. (2005). *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror*. Aldershot: Ashgate Publishing

Mayer, J. (2009). *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals*. New York: Anchor Books

Mukasey, M. (2011). The Waterboarding Trail to bin Laden. *The Wall Street Journal.* May 6, 2011

Murden, S. (2009). *The Problem of Force: Grappling with the Global Battlefield*. Boulder, Colorado: Lynne Rienner Publishers, Inc.

Nakamura, K. and Weed, M. (2009). *CRS Report for Congress: U.S. Public Diplomacy: Background and Current Issues.* Washington, D.C: Congressional Research Service

National Commission on Terrorist Attacks upon the United States (2004). *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States.* New York: Norton

Paust, J. (2007). *Beyond the Law: The Bush Administration's Unlawful Responses in the "War" on Terror.* Cambridge: Cambridge University Press

Pfiffner, J. (2008). *Power Play: The Bush Presidency and the Constitution*. Washington, DC: The Brookings Institution Press

Phythian, M. (2011). The Problem of Intelligence Ethics. In: Bergman-Rosamond, A. and Phythian, M. eds. *War, Ethics, and Justice: New Perspectives on a Post-9/11 World*. New York: Routledge, pp. 128-149

Pillar, P. (2001). *Terrorism and U.S. Foreign Policy*. Washington, DC: Brookings Institution Press

Pillar, P. and Preble, C. (2010). Don't You Know there is a War On? Assessing the Military's Role in Counterterrorism. In: Friedman, B., Harper, J., and Preble, C. eds. *Terrorizing Ourselves: Why U.S. Counterterrorism Policy is Failing and How to Fix It*. Washington, DC: Cato Institute

Pillar, P. (August 26, 2010). Interview with author.

Pincus, W. (2006) Waterboarding Historically Controversial. *Washington Post*. October 5, 2006

Rice, C. (2011). *No Higher Honor: A Memoir of My Years in Washington*. New York: Crown Publishers

Ritchie, N. and Rogers, P. (2007). *The Political Road to War with Iraq: Bush, 9/11 and the Drive to Overthrow Saddam*. New York: Routledge

Rogers, P. (2004). *A War on Terror: Afghanistan and After*. London: Pluto Press

Rogers, P. (2008). *Global Security and the War on Terror: Elite Power and the Illusion of Control*. New York: Routledge

Rumsfeld, D. (2011). *Known and Unknown: A Memoir*. New York: Sentinel Books

Sands, P. (2005). *Lawless World: America and the Making and Breaking of Global Rules from FDR's Atlantic Charter to George W. Bush's Illegal War*. New York: Viking

Sands, P. (2008). *Torture Team: Rumsfeld's Memo and the Betrayal of American Values*. New York: Palgrave Macmillan

Sanger, D. (2009). *The Inheritance: the World Obama Confronts and the Challenges to American Power.* New York: Harmony Books

Savage, C. (2007). *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy*. New York: Little, Brown and Company

Savage, C. (2012). Shift on Executive Power Lets Obama Bypass Rivals. *New York Times*. April 22, 2012

Schlesinger, A. (2004) *The Imperial Presidency*. New York: Mariner Books

Sofaer, A. (1989). Terrorism, the Law, and the National Defense. *Military Law Review*. Vol. 126, pp. 89-123

Sofaer, A. (2010). The Best Defense? Preventive Force and International Law. *Foreign Affairs*. Vol. 89, No. 1, pp. 109-133

Solis, G. (2010). America's Unlawful Combatants. *Washington Post*, March 12, 2010

Wilkerson, L. (March 3, 2011) Interview with author.

Wilkinson, P. (1986). *Terrorism and the Liberal State*. 2nd ed. New York: New York University Press

Winkler, C. (2006) *In the Name of Terrorism: Presidents on Political Violence in the Post-World War II Era,* State University of New York Press: Albany, New York

Weston, B., Falk, R., and D'Amato, A. (1990) *International Law and World Order,* West Publishing St. Paul

Yoo, J. (2003). International Law and the War in Iraq. *American Journal of International Law*, Vol. 97, p. 563-577
Yoo, J. (2006). *The Powers of War and Peace: the Constitution and Foreign Affairs after 9/11*. Chicago: University of Chicago Press

Yoo, J. (2011). From Guantanamo to Abbottabad. *The Wall Street Journal*. May 4, 2011

Zenko, M. (2010). *Between Threats and War: U.S. Discrete Military Operations in the Post-Cold War World*. Stanford, California: Stanford University Press

Chapter 9

Bacevich, A. (2005). *The New American Militarism: How Americans are Seduced by War*. Oxford: Oxford University Press

Baker, J. (2007). *In the Common Defense: National Security Law for Perilous Times*. Cambridge: Cambridge University Press

Bergen, P. (July 23, 2010). Interview with author.

Bush, G. (2010). *Decision Points*. New York: Crown Publishers

Donohue, L. (February 7, 2012). Interview with author.

Fein, B. (2008). *Constitutional Peril: The Life and Death Struggle for Our Constitution and Democracy*. New York: Palgrave Macmillan

Fein, B. (September 10, 2010). Interview with author.

Fisher, L. (September 22, 2010). Interview with author.

Fromkin, D. (1975) The Strategy of Terrorism. *Foreign Affairs*. July, pp. 9-26

Interviewee A, former CIA Analyst. (September 13, 2011). Interview with author.

Koh, H. (1990). *The National Security Constitution: Power Sharing After the Iran-Contra Affair*. New Haven: Yale University Press

Maddow, R. (2012). *Drift: The Unmooring of American Military Power*. New York: Crown Publishers

National Commission on Terrorist Attacks upon the United States (2004). *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States.* New York: Norton

Pfiffner, J. and Phythian, M. eds. (2008). *Intelligence and National Security Policymaking on Iraq: British and American Perspectives*. College Station: Texas A&M University Press

Pillar, P. (2008). Intelligence, Policy, and the War in Iraq. In: Pfiffner, J. and Phythian, M. eds. *Intelligence and National Security Policymaking on Iraq: British and American Perspectives*. College Station: Texas A&M University Press.

Pillar, P. and Preble, C. (2010). Don't You Know there is a War On? Assessing the Military's Role in Counterterrorism. In: Friedman, B., Harper, J., and Preble, C. eds. *Terrorizing Ourselves: Why U.S. Counterterrorism Policy is Failing and How to Fix It*. Washington, DC: Cato Institute

Pillar, P. (August 26, 2010). Interview with author.

Priest, D. and Arkin, W. (2011) *Top Secret America: The Rise of the New American Security State*. New York: Little, Brown and Company

Schmitt, E. and Sanger, D. (2008). Pakistan Shift Could Curtail Drone Strikes. *New York Times*, February 22, 2008

Unger, D. (2012). *The Emergency State: America's Pursuit of Absolute Security at All Costs.* Penguin Press

Wilkerson, L. (March 3, 2011) Interview with author.

Wilkinson, P. (1986). *Terrorism and the Liberal State*. 2nd ed. New York: New York University Press

Wilkinson, P. (2006). *Terrorism versus Democracy: The Liberal State Response*. 2nd ed. New York: Routledge

Wills, G. (2010). *Bomb Power: The Modern Presidency and the National Security State*. London: Penguin Books

Zenko, M. (2013). Reforming U.S. Drone Strike Policies, *Council Special Report No. 65.* New York: Council on Foreign Relations

APPENDIX 1
UN CHARTER

Art 2 (4)

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Art 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

APPENDIX 2
WAR POWERS RESOLUTION OF 1973

Public Law 93-148
93rd Congress, H. J. Res. 542
November 7, 1973

Joint Resolution

Concerning the war powers of Congress and the President.

Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This joint resolution may be cited as the "War Powers Resolution".

PURPOSE AND POLICY

SEC. 2. (a) It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgement of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicate by the circumstances, and to the continued use of such forces in hostilities or in such situations.

(b) Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

(c) The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

CONSULTATION

SEC. 3. The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situation where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

REPORTING

SEC. 4. (a) In the absence of a declaration of war, in any case in which United States Armed Forces are introduced--

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation; the president shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth--

(A) the circumstances necessitating the introduction of United States Armed Forces;

(B) the constitutional and legislative authority under which such introduction took place; and

(C) the estimated scope and duration of the hostilities or involvement.

(b) The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad

(c) Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.

CONGRESSIONAL ACTION

SEC. 5. (a) Each report submitted pursuant to section 4(a)(1) shall be transmitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate on the same calendar day. Each report so transmitted shall be referred to the Committee on Foreign Affairs of the House of Representatives and to the Committee on Foreign Relations of the Senate for appropriate action. If, when the report is transmitted, the Congress has adjourned sine die or has adjourned for any period in excess of three calendar days, the Speaker of the House of Representatives and the President pro tempore of the Senate, if they deem it advisable (or if petitioned by at least 30 percent of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section.

(b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the

United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

(c) Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

CONGRESSIONAL PRIORITY PROCEDURES FOR JOINT RESOLUTION OR BILL

SEC. 6. (a) Any joint resolution or bill introduced pursuant to section 5(b) at least thirty calendar days before the expiration of the sixty-day period specified in such section shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and such committee shall report one such joint resolution or bill, together with its recommendations, not later than twenty-four calendar days before the expiration of the sixty-day period specified in such section, unless such House shall otherwise determine by the yeas and nays.

(b) Any joint resolution or bill so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents), and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a joint resolution or bill passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out not later than fourteen calendar days before the expiration of the sixty-day period specified in section 5(b). The joint resolution or bill so reported shall become the pending business of the House in question and shall be voted on within three calendar days after it has been reported, unless such House shall otherwise determine by yeas and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a joint resolution or bill passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such resolution or bill not later than four calendar days before the expiration of the sixty-day period specified in section 5(b). In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than the expiration of such sixty-day period.

CONGRESSIONAL PRIORITY PROCEDURES FOR CONCURRENT RESOLUTION

SEC. 7. (a) Any concurrent resolution introduced pursuant to section 5(b) at least thirty calendar days before the expiration of the sixty-day period specified in such section shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and one such concurrent resolution shall be reported out by such committee together with its recommendations within fifteen calendar days, unless such House shall otherwise determine by the yeas and nays.

(b) Any concurrent resolution so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents), and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a concurrent resolution passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out by such committee together with its recommendations within fifteen calendar days and shall thereupon become the pending business of such House and shall be voted on within three calendar days after it has been reported, unless such House shall otherwise determine by yeas and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a concurrent resolution passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such concurrent resolution within six calendar days after the legislation is referred to the committee of conference. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than six calendar days after the conference report is filed. In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement.

INTERPRETATION OF JOINT RESOLUTION

SEC. 8. (a) Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred--

(1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution; or

(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.

(b) Nothing in this joint resolution shall be construed to require any further specific statutory authorization to permit members of United States Armed Forces to participate jointly with members of the armed forces of one or more foreign countries in the headquarters operations of high-level military commands which were established prior to the date of enactment of this joint resolution and pursuant to the United Nations Charter or any treaty ratified by the United States prior to such date.

(c) For purposes of this joint resolution, the term "introduction of United States Armed Forces" includes the assignment of member of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.

(d) Nothing in this joint resolution--
(1) is intended to alter the constitutional authority of the Congress or of the President, or the provision of existing treaties; or (2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.

SEPARABILITY CLAUSE

SEC. 9. If any provision of this joint resolution or the application thereof to any person or circumstance is held invalid, the remainder of the joint resolution and the application of such provision to any other person or circumstance shall not be affected thereby.

EFFECTIVE DATE

SEC. 10. This joint resolution shall take effect on the date of its enactment.

CARL ALBERT
Speaker of the House of Representatives.

JAMES O. EASTLAND
President of the Senate pro tempore.

IN THE HOUSE OF REPRESENTATIVES, U.S.,
November 7, 1973.

The House of Representatives having proceeded to reconsider the resolution (H. J. Res 542) entitled "Joint resolution concerning the war powers of Congress and the President", returned by the President of the United States with his objections, to the House of Representatives, in which it originated, it was Resolved, That the said resolution pass, two-thirds of the House of Representatives agreeing to pass the same.

Attest:

W. PAT JENNINGS
Clerk.

I certify that this Joint Resolution originated in the House of Representatives.
W. PAT JENNINGS
Clerk.

IN THE SENATE OF THE UNITED STATES
November 7, 1973

The Senate having proceeded to reconsider the joint resolution (H. J. Res. 542) entitled "Joint resolution concerning the war powers of Congress and the President", returned by the President of the United States with his objections to the House of Representatives, in which it originate, it was
Resolved, That the said joint resolution pass, two-thirds of the Senators present having voted in the affirmative.

APPENDIX 3
AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST TERRORISTS

Public Law 107-40
107th Congress

Joint Resolution

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States. <<NOTE: Sept. 18, 2001 - [S.J. Res. 23]>>

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and
Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and
Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and
Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and
Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, <<NOTE: Authorization for Use of Military Force. 50 USC 1541 note.>>

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the ``Authorization for Use of Military Force".

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) <<NOTE: President.>> In General.--That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) War Powers Resolution Requirements.--
(1) Specific statutory authorization.--Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific

statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

[[Page 115 STAT. 225]]

(2) Applicability of other requirements.--Nothing in this resolution supercedes any requirement of the War Powers Resolution.

Approved September 18, 2001.

LEGISLATIVE HISTORY--S.J. Res. 23 (H.J. Res. 64):

CONGRESSIONAL RECORD, Vol. 147 (2001):
Sept. 14, considered and passed Senate and House.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 37 (2001):
Sept. 18, Presidential statement.

APPENDIX 4
AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST IRAQ RESOLUTION OF 2002

H.J.Res.114

One Hundred Seventh Congress

of the

United States of America

AT THE SECOND SESSION
Begun and held at the City of Washington on Wednesday,

the twenty-third day of January, two thousand and two

Joint Resolution

To authorize the use of United States Armed Forces against Iraq.

Whereas in 1990 in response to Iraq's war of aggression against and illegal occupation of Kuwait, the United States forged a coalition of nations to liberate Kuwait and its people in order to defend the national security of the United States and enforce United Nations Security Council resolutions relating to Iraq;

Whereas after the liberation of Kuwait in 1991, Iraq entered into a United Nations sponsored cease-fire agreement pursuant to which Iraq unequivocally agreed, among other things, to eliminate its nuclear, biological, and chemical weapons programs and the means to deliver and develop them, and to end its support for international terrorism;

Whereas the efforts of international weapons inspectors, United States intelligence agencies, and Iraqi defectors led to the discovery that Iraq had large stockpiles of chemical weapons and a large scale biological weapons program, and that Iraq had an advanced nuclear weapons development program that was much closer to producing a nuclear weapon than intelligence reporting had previously indicated;

Whereas Iraq, in direct and flagrant violation of the cease-fire, attempted to thwart the efforts of weapons inspectors to identify and destroy Iraq's weapons of mass destruction stockpiles and development capabilities, which finally resulted in the withdrawal of inspectors from Iraq on October 31, 1998;

Whereas in Public Law 105-235 (August 14, 1998), Congress concluded that Iraq's continuing weapons of mass destruction programs threatened vital United States interests and international peace and security, declared Iraq to be in `material and unacceptable breach of its international obligations' and urged the President `to take appropriate action, in accordance with the

Constitution and relevant laws of the United States, to bring Iraq into compliance with its international obligations';

Whereas Iraq both poses a continuing threat to the national security of the United States and international peace and security in the Persian Gulf region and remains in material and unacceptable breach of its international obligations by, among other things, continuing to possess and develop a significant chemical and biological weapons capability, actively seeking a nuclear weapons capability, and supporting and harboring terrorist organizations;

Whereas Iraq persists in violating resolution of the United Nations Security Council by continuing to engage in brutal repression of its civilian population thereby threatening international peace and security in the region, by refusing to release, repatriate, or account for non-Iraqi citizens wrongfully detained by Iraq, including an American serviceman, and by failing to return property wrongfully seized by Iraq from Kuwait;

Whereas the current Iraqi regime has demonstrated its capability and willingness to use weapons of mass destruction against other nations and its own people;

Whereas the current Iraqi regime has demonstrated its continuing hostility toward, and willingness to attack, the United States, including by attempting in 1993 to assassinate former President Bush and by firing on many thousands of occasions on United States and Coalition Armed Forces engaged in enforcing the resolutions of the United Nations Security Council;

Whereas members of al Qaida, an organization bearing responsibility for attacks on the United States, its citizens, and interests, including the attacks that occurred on September 11, 2001, are known to be in Iraq;

Whereas Iraq continues to aid and harbor other international terrorist organizations, including organizations that threaten the lives and safety of United States citizens;

Whereas the attacks on the United States of September 11, 2001, underscored the gravity of the threat posed by the acquisition of weapons of mass destruction by international terrorist organizations;

Whereas Iraq's demonstrated capability and willingness to use weapons of mass destruction, the risk that the current Iraqi regime will either employ those weapons to launch a surprise attack against the United States or its Armed Forces or provide them to international terrorists who would do so, and the extreme magnitude of harm that would result to the United States and its citizens from such an attack, combine to justify action by the United States to defend itself;

Whereas United Nations Security Council Resolution 678 (1990) authorizes the use of all necessary means to enforce United Nations Security Council Resolution 660 (1990) and subsequent relevant resolutions and to compel Iraq to cease certain activities that threaten international peace and security,

including the development of weapons of mass destruction and refusal or obstruction of United Nations weapons inspections in violation of United Nations Security Council Resolution 687 (1991), repression of its civilian population in violation of United Nations Security Council Resolution 688 (1991), and threatening its neighbors or United Nations operations in Iraq in violation of United Nations Security Council Resolution 949 (1994);

Whereas in the Authorization for Use of Military Force Against Iraq Resolution (Public Law 102-1), Congress has authorized the President `to use United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation of Security Council Resolution 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677';

Whereas in December 1991, Congress expressed its sense that it `supports the use of all necessary means to achieve the goals of United Nations Security Council Resolution 687 as being consistent with the Authorization of Use of Military Force Against Iraq Resolution (Public Law 102-1),' that Iraq's repression of its civilian population violates United Nations Security Council Resolution 688 and `constitutes a continuing threat to the peace, security, and stability of the Persian Gulf region,' and that Congress, `supports the use of all necessary means to achieve the goals of United Nations Security Council Resolution 688';

Whereas the Iraq Liberation Act of 1998 (Public Law 105-338) expressed the sense of Congress that it should be the policy of the United States to support efforts to remove from power the current Iraqi regime and promote the emergence of a democratic government to replace that regime;

Whereas on September 12, 2002, President Bush committed the United States to `work with the United Nations Security Council to meet our common challenge' posed by Iraq and to `work for the necessary resolutions,' while also making clear that `the Security Council resolutions will be enforced, and the just demands of peace and security will be met, or action will be unavoidable';

Whereas the United States is determined to prosecute the war on terrorism and Iraq's ongoing support for international terrorist groups combined with its development of weapons of mass destruction in direct violation of its obligations under the 1991 cease-fire and other United Nations Security Council resolutions make clear that it is in the national security interests of the United States and in furtherance of the war on terrorism that all relevant United Nations Security Council resolutions be enforced, including through the use of force if necessary;

Whereas Congress has taken steps to pursue vigorously the war on terrorism through the provision of authorities and funding requested by the President to take the necessary actions against international terrorists and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such persons or organizations;

Whereas the President and Congress are determined to continue to take all appropriate actions against international terrorists and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such persons or organizations;

Whereas the President has authority under the Constitution to take action in order to deter and prevent acts of international terrorism against the United States, as Congress recognized in the joint resolution on Authorization for Use of Military Force (Public Law 107-40); and

Whereas it is in the national security interests of the United States to restore international peace and security to the Persian Gulf region: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the `Authorization for Use of Military Force Against Iraq Resolution of 2002'.

SEC. 2. SUPPORT FOR UNITED STATES DIPLOMATIC EFFORTS.

The Congress of the United States supports the efforts by the President to--

(1) strictly enforce through the United Nations Security Council all relevant Security Council resolutions regarding Iraq and encourages him in those efforts; and

(2) obtain prompt and decisive action by the Security Council to ensure that Iraq abandons its strategy of delay, evasion and noncompliance and promptly and strictly complies with all relevant Security Council resolutions regarding Iraq.

SEC. 3. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) AUTHORIZATION- The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to--

(1) defend the national security of the United States against the continuing threat posed by Iraq; and

(2) enforce all relevant United Nations Security Council resolutions regarding Iraq.

(b) PRESIDENTIAL DETERMINATION- In connection with the exercise of the authority granted in subsection (a) to use force the President shall, prior to such exercise or as soon thereafter as may be feasible, but no later than 48 hours after exercising such authority, make available to the Speaker of the House of Representatives and the President pro tempore of the Senate his determination that--

(1) reliance by the United States on further diplomatic or other peaceful means alone either (A) will not adequately protect the national security of the United States against the continuing threat posed by Iraq or (B) is not likely to lead to enforcement of all relevant United Nations Security Council resolutions regarding Iraq; and

(2) acting pursuant to this joint resolution is consistent with the United States and other countries continuing to take the necessary actions against international terrorist and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001.

(c) War Powers Resolution Requirements-

(1) SPECIFIC STATUTORY AUTHORIZATION- Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS- Nothing in this joint resolution supersedes any requirement of the War Powers Resolution.

SEC. 4. REPORTS TO CONGRESS.

(a) REPORTS- The President shall, at least once every 60 days, submit to the Congress a report on matters relevant to this joint resolution, including actions taken pursuant to the exercise of authority granted in section 3 and the status of planning for efforts that are expected to be required after such actions are completed, including those actions described in section 7 of the Iraq Liberation Act of 1998 (Public Law 105-338).

(b) SINGLE CONSOLIDATED REPORT- To the extent that the submission of any report described in subsection (a) coincides with the submission of any other report on matters relevant to this joint resolution otherwise required to be submitted to Congress pursuant to the reporting requirements of the War Powers Resolution (Public Law 93-148), all such reports may be submitted as a single consolidated report to the Congress.

(c) RULE OF CONSTRUCTION- To the extent that the information required by section 3 of the Authorization for Use of Military Force Against Iraq Resolution (Public Law 102-1) is included in the report required by this section, such report shall be considered as meeting the requirements of section 3 of such resolution.

Speaker of the House of Representatives.

APPENDIX 5
LIST OF INTERVIEWS

1. **Peter Bergen**

National security analyst for CNN, fellow at the New America Foundation and New York University's Center on Law & Security, and author of several books on al Qaeda, including *Holy War, Inc.*, *The Osama Bin Laden I Know* and *The Longest War*. His latest book is *Manhunt: The Ten Year Search for bin Laden from 9/11 to Abbottabad*. Bergen is one of the few Western journalists to have interviewed Osama Bin Laden.

2. **Bruce Fein**

Former Reagan administration lawyer and author of several books on constitutional law, including *American Empire Before the Fall* and *Constitutional Peril: The Life and Death Struggle for our Constitution and Democracy.* He is a Visiting Fellow for Constitutional Studies at the Heritage Foundation, Adjunct Scholar at the American Enterprise Institute, and Guest Lecturer at the Brookings Institute. He was also Research Director for the House Republicans on the Joint Congressional Committee on Covert Arms Sales to Iran from 1986-1987.

3. **Louis Fisher**

Former Senior Specialist, Congressional Research Service, Library of Congress. He is the author of many books on constitutional government including *Presidential War Power* and *The Constitution and 9/11: Recurring Threats to America's Freedoms.*

4. **Paul Pillar**

Former deputy chief of the counterterrorist center at the CIA from 1997 to 1999. He was appointed National Intelligence Officer for the Near East and South Asia in October 2000. He joined the Central Intelligence Agency in 1977 and served in a variety of positions, including chief of analytic units covering portions of the Near East, the Persian Gulf, and South Asia. He previously served in the National Intelligence Council as one of the original members of its Analytic Group. He is the author of *Terrorism and US Foreign Policy*.

5. **Lawrence Wilkerson**

Former Chief of Staff to Secretary of State Colin Powell from 2002 to 2005. Prior to that he was Associate Director of the State Department's Policy Planning staff under the directorship of Ambassador Richard N. Haass, and member of that staff responsible for East Asia and the Pacific, political-military and legislative affairs (2001-2002). Before serving at the State Department, Wilkerson served 31 years in the U.S. Army, including as Deputy Executive Officer to then-General Colin Powell when he commanded the U.S. Army Forces Command (1989), and Special Assistant to General Powell when he was Chairman of the Joint Chiefs of Staff (1989-1993).

6. **Interviewee A**

Former CIA analyst. She worked for the CIA for 21 years, including a position as a counterterrorism analyst, until she retired in 2004. She was in the Counterterrorism Center (CTC) at the CIA for the last year of the Clinton administration and for the first three years of the Bush II administration (during the 9/11 attacks). At her request, her name is not used.

7. **Laura Donohue**

Professor at Georgetown University Law Center in Washington, DC. She wrote *The Costs of Counterterrorism: Power, Politics, and Liberty* and teaches National Security Law at the law school. She also publishes on the state secrets doctrine. She received her PhD from Cambridge University and her J.D. from Stanford University.